Study K-402 September 18, 2017

Memorandum 2017-51

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct (Public Comment on Tentative Recommendation)

The Commission is fortunate to have received many comments on its tentative recommendation in this study.¹ Those comments are attached for the Commissioners and other interested persons to review.

The staff will analyze the comments in Memorandum 2017-52. We are still in the process of preparing that memorandum.

To facilitate review of the attached comments, we have divided them into two groups, as shown in the exhibit list that precedes the comments:

- (1) Opposition or serious concerns.
- (2) Generally supportive comments.

Within each group, we separated the comments of stakeholder organizations from those of individuals. We also consolidated the comments of numerous individuals associated with the Consortium for Children, which are almost identical in content.

Some of the commenters have previously provided input in this study. In the exhibit list, the staff shaded the names of those commenters in gray, to help distinguish them from individuals and organizations who are speaking up for the first time. For convenient reference, we also inserted footnotes with citations to prior comments.

It may be useful to know whether a person has commented in the past and what that person previously said (if anything), but all of the input on the tentative recommendation is important. A prior commenter may have shared new ideas or expressed a particular viewpoint more persuasively than in the past.

^{1.} Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

On behalf of the Commission, we want to thank all of the commenters for taking the time to consider the tentative recommendation and provide input. Public participation is crucial in the Commission's study process.

Respectfully submitted,

Barbara Gaal Chief Deputy Counsel

OPPOSITION OR SERIOUS CONCERN

Organizations Expressing Opposition or Serious Concern

	Exhibit p
•	Hon. Raymond M. Cadei, Civil and Small Claims Advisory Committee of the Judicial Council of California (9/13/17)
•	Kate Cleary, Consortium for Children (8/29/17)5
•	Consumer Attorneys of California and California Defense Counsel (joint submission) (8/31/17)
•	Affairs (9/1/17)8
•	Stacey H. Langenbahn, Academy of Professional Family Mediators (8/30/17)
•	Hon. David W. Long (ret.), California Judges Ass'n $(8/18/17)^2 \dots 12$
	Charles Pereyra-Suarez, California Dispute Resolution Council (8/30/17) ³
	Joseph P. Spirito, Jr., Executive Committee of Family Law Section of Los Angeles County Bar Ass'n (8/9/17)19
•	·
•	Christopher Welch, Center for Conflict Resolution (9/1/17)21
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	Christopher Welch, Center for Conflict Resolution $(9/1/17)$ 21 nents From Individuals Associated With the Consortium for Children Exhibit p Alecia Allison-Thomas $(8/29/17)$ 23 Barbara Anscher $(8/25/17)^4$ 24 Courtney Bennett $(8/25/17)$ 25 Luis Bu $(8/31/17)$ 26 Debbie Catz $(8/26/17)$ 27 Patty Cho $(8/29/17)$ 28 Amy Cohen $(8/29/17)$ 29
i i	Christopher Welch, Center for Conflict Resolution $(9/1/17)$
i i	Christopher Welch, Center for Conflict Resolution (9/1/17) 21 nents From Individuals Associated With the Consortium for Children Exhibit p Alecia Allison-Thomas (8/29/17) 23 Barbara Anscher (8/25/17) ⁴ 24 Courtney Bennett (8/25/17) 25 Luis Bu (8/31/17) 26 Debbie Catz (8/26/17) 27 Patty Cho (8/29/17) 28 Amy Cohen (8/29/17) 29 Brigitte Dutil (8/29/17) 30 Allison Edwards (8/25/17) 31
	Christopher Welch, Center for Conflict Resolution $(9/1/17)$
	Christopher Welch, Center for Conflict Resolution $(9/1/17)$
	Christopher Welch, Center for Conflict Resolution $(9/1/17)$

^{2.} For previous written comments by the California Judges Ass'n ("CJA"), see Memorandum 2016-19, Exhibit pp. 5-6. CJA representatives have also participated in several Commission meetings (Dec. 2016, Feb. 2017, April 2017, and June 2017).

^{3.} For previous written comments by the California Dispute Resolution Council ("CDRC"), see Memorandum 2015-45, Exhibit p. 8; Second Supplement to Memorandum 2013-47, Exhibit pp. 3-7. CDRC representatives have also participated in Commission meetings throughout this study.

^{4.} For previous comments by Barbara Anscher, see Memorandum 2015-46, Exhibit p. 10.

Comments From Individuals Associated With the Consortium $(cont'd)$	for Children
Rajmeet Grewal (8/29/17)	36
• Cindy Halliday-Schulte (8/27/17)	
• Dena Hartley (8/30/17)	
• LaTasha Jones (8/30/17)	
• Leslie Kalmbach (8/25/17)	
Marcia Kamiya-Cross, San Rafael (8/25/17)	
• Sharon Katakura (8/28/17)	
• Marie Le (8/25/17)	
Hourig Mardirossian (8/28/17)	
Barbara Matthews (8/30/17)	
• Chanin Michael (8/26/17)	
• Elizabeth Momen (8/29/17)	
• Deborah Moodie (8/31/17)	
• Varinka Muldawer (8/29/17)	
• Suzannah Noch (8/25/17)	
• Josie Plascencia (8/30/17)	52
• Anna Reyes (9/1/17)	53
• Keri Saldana (8/29/17)	54
• Dana Sarmiento (8/25/17)	55
• Teresa Serrano (8/29/17)	56
• Susan Sher (8/30/17)	57
• Naomi Stal (8/31/17)	58
Barbara Sterbentz (8/29/17)	60
• Luanne Stocks (8/29/17)	61
• Melissa Tappis (8/30/17)	62
• Elise Thompson (8/26/17)	63
• Margot Umemoto (8/28/17)	64
• Eva Wexler (8/30/17)	65
• Barbara White (8/25/17)	66
• Susan Yobp, San Rafael (8/25/17)	67
Other Individuals Expressing Opposition or Serious Concern	
	Exhibit p
• Lisa Bass, San Francisco (6/29/17)	
• Cari Baum, Santa Ana (8/28/17)	
• Jeanne Behling, Tustin (8/29/17)	
• Gillian Brady, Davis (6/29/17) ⁵	
• Daniel J. Cooper, Laguna Hills (8/29/17)	74

^{5.} For previous comments by Gillian Brady, see First Supplement to Memorandum 2015-46, Exhibit p. 4.

Other Individuals Expressing Opposition or Serious Concern (cont'd)

Gwen Earle (9/1/17)	. 75
Robert Flack, Los Angeles (9/1/17) ⁶	76
Howard J. Franco, Jr., Carlsbad (8/14/17)	86
Lynne Higgs, Burlingame (7/17/17)	89
Richard Huver, San Diego (8/16/17)	91
Michael Jonsson, Sacramento (9/7/17)	93
Elizabeth Jones, Newport Beach (8/29/17) ⁷	97
Ron Kelly, Berkeley (8/30/17) ⁸	98
Neil J. Moran, San Rafael (6/29/17)	101
Raymond Ryan, Stanford, Ryan & Associates, APC (8/4/17)	103
Elizabeth Strickland, San Jose (8/31/17)	109
Jill Switzer, Pasadena (8/24/17)9	113
Michael Trust, Mission Viejo (7/23/17)	115
A. Marco Turk, Professor & Program Director Emeritus, CSU Dominguez Hills (7/4/17) ¹⁰	117
Kirk D. Yake, San Diego (9/1/17) ¹¹	120
	Howard J. Franco, Jr., Carlsbad (8/14/17). Lynne Higgs, Burlingame (7/17/17) Richard Huver, San Diego (8/16/17). Michael Jonsson, Sacramento (9/7/17) Elizabeth Jones, Newport Beach (8/29/17) ⁷ Ron Kelly, Berkeley (8/30/17) ⁸ Neil J. Moran, San Rafael (6/29/17). Raymond Ryan, Stanford, Ryan & Associates, APC (8/4/17) . Elizabeth Strickland, San Jose (8/31/17). Jill Switzer, Pasadena (8/24/17) ⁹ Michael Trust, Mission Viejo (7/23/17). A. Marco Turk, Professor & Program Director Emeritus, CSU Dominguez Hills (7/4/17) ¹⁰

^{6.} For previous written comments by Robert Flack, see First Supplement to Memorandum 2017-20, Exhibit pp. 3-5; Second Supplement to Memorandum 2017-9, Exhibit pp. 1-11; Memorandum 2016-60, Exhibit pp. 1-7; Memorandum 2016-59, Exhibit pp. 49-50; Memorandum 2016-50, Exhibit pp. 1-13, 14-58; First Supplement to Memorandum 2016-39, Exhibit pp. 1-4; Second Supplement to Memorandum 2016-39, Exhibit pp. 1-3, 4-6; Memorandum 2016-30, Exhibit pp. 1-9; First Supplement to Memorandum 2016-30, Exhibit pp. 1-2; Third Supplement to Memorandum 2015-54, Exhibit pp. 1-18. Mr. Flack has also participated in many Commission meetings in this study.

^{7.} For previous comments by Elizabeth Jones, see First Supplement to Memorandum 2015-46, Exhibit p. 17.

^{8.} For previous written comments by Ron Kelly, see First Supplement to Memorandum 2017-30, Exhibit p. 1; Memorandum 2017-20, Exhibit p. 2; Memorandum 2017-19, Exhibit p. 1; First Supplement to Memorandum 2016-60, Exhibit p. 4; Memorandum 2016-59, Exhibit pp. 51-53; Memorandum 2016-37, Exhibit pp. 1-2, 37; Memorandum 2016-38, Exhibit p. 1; Memorandum 2016-30, Exhibit pp. 22-23; First Supplement to Memorandum 2016-30, Exhibit pp. 3-4; Memorandum 2016-8, Exhibit pp. 8-10; Memorandum 2015-46, Exhibit p. 1; Memorandum 2015-36, Exhibit pp. 8-11; Third Supplement to Memorandum 2015-60, Exhibit p. 3; Memorandum 2014-27, Exhibit p. 2; First Supplement to Memorandum 2014-6, Exhibit pp. 1-2; Memorandum 2014-6, Exhibit pp. 1-3; Memorandum 2013-39, Exhibit pp 19-42. Mr. Kelly has also participated in Commission meetings throughout this study.

^{9.} For previous written comments by Jill Switzer, see Memorandum 2015-54, Exhibit pp. 28-30. Ms. Switzer also participated in the Commission's July 2016 meeting.

^{10.} A. Marco Turk has not previously submitted comments directly to the Commission, but he has written several *Daily Journal* articles relating to this study, which the staff has provided to the Commissioners. See First Supplement to Memorandum 2015-54, p. 2, n. 16.

^{11.} For previous comments by Kirk Yake, see First Supplement to Memorandum 2015-54, Exhibit p. 30.

GENERALLY SUPPORTIVE COMMENTS

Organizations in General Support

			Exhibit p.
	•	Larry Doyle, Conference of California Bar Ass'ns ¹² (9/1/17)	122
Indi	ivid	uals in General Support	
			Exhibit p.
	•	John P. Blumberg, Long Beach (8/7/17)	124
	•	David J. Habib, Jr., Westlake Village (6/28/17)	126
	•	Jeff Kichaven, Los Angeles (8/29/17) ¹³	127
	•	Elizabeth Moreno, Los Angeles (7/18/17) ¹⁴	134
	•	John E. Porter & Deborah Blair Porter, Manhattan Beach $(9/1/17)^3$	135
	•	Peter Robinson, Malibu (8/29/17) ¹⁶	151
	•	Jerome Sapiro, Jr., San Francisco ¹⁷ (7/26/17)	152
	•	Nancy Neal Yeend (7/7/17) ¹⁸	154

12. For previous written comments by the Conference of California Bar Associations ("CCBA"), see First Supplement to Memorandum 2017-20, Exhibit pp. 1-2; First Supplement to Memorandum 2016-60, Exhibit pp. 1-3; Third Supplement to Memorandum 2015-46, Exhibit pp. 1-3. Mr. Doyle has also participated in a number of Commission meetings on behalf of CCBA (April 2014, June 2014, Oct. 2014, Feb. 2015, April 2015, June 2015, Feb. 2016, and June 2017).

13. For previous written comments by Jeff Kichaven, see First Supplement to Memorandum 2017-20, Exhibit pp. 6-13; First Supplement to Memorandum 2017-9, Exhibit pp. 7-10; First Supplement to Memorandum 2016-60, Exhibit pp. 5-9; Memorandum 2016-50, Exhibit pp. 14-16; First Supplement to Memorandum 2016-39, Exhibit pp. 5-17; Second Supplement to Memorandum 2016-30, Exhibit pp. 3-5; Memorandum 2016-19, Exhibit pp. 2-4; Second Supplement to Memorandum 2016-19, Exhibit pp. 1-3; First Supplement to Memorandum 2015-46, Exhibit pp. 44-48; see also Memorandum 2014-14, Exhibit pp. 96-98 (*Daily Journal* article by Mr. Kichaven). Mr. Kichaven has also participated in a number of Commission meetings in this study (Aug. 2013, Aug. 2015, Dec. 2015, Feb. 2016, June 2016, July 2016, Sept. 2016, Dec. 2016, and Feb. 2017).

14. For previous written comments by Elizabeth Moreno, see Memorandum 2016-39, Exhibit pp. 1-2; Second Supplement to Memorandum 2015-46, Exhibit p. 16; Memorandum 2013-47, Exhibit pp. 1-2. Ms. Moreno also participated in the Commission's Aug. 2013 meeting.

15. For previous written comments by Deborah Blair Porter and/or John E. Porter, see Memorandum 2015-46, Exhibit pp. 212, 221-28; First Supplement to Memorandum 2015-36, Exhibit pp. 1-38; First Supplement to Memorandum 2013-47, Exhibit pp. 17-23. Ms. Porter also participated in the Commission's Aug. 2013 and Aug. 2015 meetings.

16. For previous comments by Peter Robinson, see Memorandum 2015-46, Exhibit p. 214.

17. For previous comments by Jerome Sapiro, Jr., see Memorandum 2014-6, Exhibit p. 13; Second Supplement to Memorandum 2013-47, Exhibit pp. 8-9.

18. For previous written comments by Nancy Neal Yeend, see First Supplement to Memorandum 2017-20, Exhibit p. 14; Memorandum 2016-60, Exhibit pp. 8-9; Memorandum 2016-50, Exhibit p. 17; Memorandum 2016-39, Exhibit pp. 5, 6-7; Memorandum 2016-8, Exhibit pp. 14-15; Second Supplement to Memorandum 2015-54, Exhibit p. 11; Memorandum 2015-46, Exhibit p. 217; First Supplement to Memorandum 2015-46, Exhibit p. 57; Memorandum 2015-36, Exhibit pp. 12-14; First Supplement to Memorandum 2015-36, p.1; Memorandum 2015-24, Exhibit p. 3; Memorandum 2015-13, Exhibit p. 49; Memorandum 2014-60, Exhibit p. 1; First Supplement to Memorandum 2014-36, Exhibit p. 1; Memorandum 2014-27, Exhibit pp. 7-8; Memorandum 2014-6, Exhibit pp. 14-15; Third Supplement to Memorandum 2013-47, Exhibit pp. 3-6; First

Individuals in General Support (cont'd	Individual	ls in	General	Support	(cont'd
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•	Richard Zitrin, San Francisco ¹⁹	(9	/1	$/17^{\circ}$)	55

Supplement to Memorandum 2013-39, Exhibit pp. 1-2; see also Memorandum 2014-14, Exhibit pp. 114-15 (*Daily Journal* aticle by Ms. Yeend & Stephen Gizzi); Memorandum 2013-39, Exhibit p. 42 (Ms. Yeend's letter in support of AB 2025). Ms. Yeend also participated in the Commission's Oct. 2013 and Feb. 2016 meetings.

^{19.} For previous comments by Richard Zitrin, see First Supplement to Memorandum 2017-20, Exhibit p. 15; Memorandum 2016-49, Exhibit p. 1; First Supplement to Memorandum 2016-19, Exhibit pp. 5-6; Memorandum 2015-46, Exhibit pp. 219-20; Memorandum 2014-6, Exhibit pp. 16-20.



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JUDICIAL COUNCIL OF CALIFORNIA

September 13, 2017

California Law Revision Commission 4000 Middlefield Road, Room D-2 Palo Alto, CA 94303-4739

Re: Tentative Recommendation Regarding the Relationship between Mediation Confidentiality and Attorney Malpractice and Other Misconduct

Dear Members of the Law Revision Commission:

I am writing to you on behalf of the Civil and Small Claims Advisory Committee of the Judicial Council of California. The committee membership includes justices, judges, court administrators, lawyers whose primary area of practice is civil law, and persons knowledgeable about court-connected alternative dispute resolution programs for civil and small claims cases. The committee is charged with identifying issues and concerns affecting court administration in civil and small claims proceedings and making recommendations to the Judicial Council for improving the administration of justice in these proceedings. With the Council's permission, the committee is providing comments on the Commission's tentative recommendation regarding the relationship between mediation confidentiality and attorney malpractice and other misconduct.

The committee appreciates all of the work that the Commission has put into the development of this tentative recommendation, including the many staff memoranda and Commission meetings, the efforts to gather and assess information about the law in other states and empirical information relevant to mediation confidentiality and attorney misconduct in mediation, and the attempt to balance the competing policy interests relating to maintaining confidentiality vs. permitting disclosure of mediation information to prove attorney misconduct. In the view of the committee, however, the potential risks of making the statutory changes tentatively recommended by the Commission outweigh the potential benefits.

California Law Revision Commission September 13, 2017 Page 2

In the experience of committee members, California's current statutory scheme relating to mediation confidentiality, which the Commission helped craft 20 years ago, provides the benefits articulated on pages 9-16 of the Commission's tentative recommendation: it promotes candid discussion in mediation which, in turn, promotes the resolution of disputes in mediation, and resolution of disputes in this way is beneficial to disputants, the court system, and society. Focusing in narrowly on the benefits to the court system, the committee believes that resolution of civil cases, or disputes that would otherwise become civil cases, through mediation, whether in court-connected mediation programs, community mediation programs, or private mediation, reduces the civil cases pending in the courts and frees up court resources to focus on those cases that are in most need of court attention.

The Committee is concerned that the statutory changes tentatively recommended by the Commission could discourage both participation and candid discussion in mediation, which could, in turn, reduce the number of disputes resolved through mediation. These statutory changes would permit mediation communications to be disclosed in the three additional types of subsequent proceedings identified in the recommendation. Although mediators would still generally be incompetent to testify in most proceedings, other mediation participants would not be protected from being called to testify in the proceedings identified in the recommendation. Thus disputants contemplating participating in mediation will have less assurance in advance that their communications will be confidential and more risk that they will be called to testify in a subsequent proceeding as a result of participating in mediation. They will also not necessarily be in control of what happens; another disputant or mediation participant could trigger the disclosure or requirement to testify by the filing of a malpractice action or State Bar complaint against his or her attorney. The committee is concerned that this uncertainty and risk could make some disputants opt not to participate in mediation. The committee is also concerned that this uncertainty and risk could make some disputants who do participate in mediation less willing open and candid during the process.

The Committee is also concerned that the tentatively recommended statutory changes could discourage individuals from serving as mediators, particularly in court-connected mediation programs. The Committee appreciates the Commission's effort to protect mediators from being called to testify by including language in proposed Evidence Code Section 1120.5(e) making clear that a mediator is incompetent either to testify or to produce documents. The Committee is concerned, however, that despite this effort, the creation of the new exception to mediation confidentiality may result in more mediators being subpoenaed. Currently, the confidentiality of mediation communications serves as a secondary defense against any effort to elicit mediator testimony about what happened at mediation; not only is the mediator incompetent to testify under Evidence Code section 703.5, but sections 1115-1128 prevent a mediator from revealing or reporting on what happened. The Commission's tentative recommendation would remove this

California Law Revision Commission September 13, 2017 Page 3

secondary defense in the three types of proceedings subject to the confidentiality exception. The Committee is concerned that this would embolden more attempts to subpoena mediators. If this occurs, it will place additional burdens on mediators who must seek to quash these subpoenas. Since many mediators in court-connected mediation programs serve on either a pro bono or reduced-fee basis, the risk of such an additional burden could discourage some individuals from providing their services as mediators in these programs. Several administrators of court-connected mediation programs reported that some mediators on their panels indicated that they would resign from the panel if the changes tentatively recommended by the Commission were enacted. This could harm the ability of these programs to serve litigants and the courts.

Although the Commission does not intend that the provisions be used to re-open settlement, this recommendation might, however, increase the number of malpractice claims brought, as possible means of providing leverage to change settlement agreements reached in mediation. The Committee also notes that the recommendation would also place a burden on courts both in potential additional litigation but more importantly in implementation of the recommended provisions, which could require in camera reviews, protective orders, discovery motions, evidence code 402-3 hearings, sealing orders, and other proceedings. This is a complex measure which is likely to require substantial judicial supervision. The very nuanced approach taken, understandably to ameliorate potential problems, means more judicial involvement.

The Committee's view is that there has not been a sufficient showing that attorney misconduct in mediation is frequent enough to justify taking the risks presented by the Commission's tentative recommendation. The Commission made a great effort to identify any empirical information about the scope of attorney misconduct in mediation, but found little such information. Based on what was available, the Commission acknowledges that mediation misconduct appears to be relatively infrequent. This is consistent with information reported by several administrators of court-connected mediation programs. Participants in these programs often raise any concerns that they might have with the mediation program or process with the program administrator. These administrators, many with decades of experience, reported, however, they had received few if any complaints about attorney misconduct in mediations conducted within their programs during their careers.

The Committee acknowledges that the risks it has identified above as potentially flowing from the Commission's tentative recommendation are theoretical. As discussed in the Commission's tentative recommendation, there is essentially no way to empirically test the impact of creating an exception to mediation confidentiality on the use and efficacy of mediation and we are not aware of any other jurisdiction in which mediation confidentiality was reduced in this way to which we could look to for its experience. However, it seems clear that the universe of situations in which the changes tentatively recommended by the Commission would be helpful—mediations in which attorneys are committing misconduct that currently cannot be addressed

California Law Revision Commission September 13, 2017 Page 4

because of the mediation confidentiality laws – is much smaller than the universe of situations in which the implementation of these changes presents a risk of harm – all other mediations in which attorneys are representing a participant. Given this, the Committee believes that the potential risks of making the statutory changes tentatively recommended by the Commission are likely to outweigh the potential benefits.

Thank you for this opportunity to submit comments on the Commission's tentative recommendation.

Sincerely,

Hon. Raymond M. Cadei, Chair

EMAIL FROM KATE CLEARY, CONSORTIUM FOR CHILDREN (8/29/17)

Re: Proposed Modification to the Evidence Code Pertaining to Mediation

Consortium for Children would like to express our strong opposition to the proposed Law Revision Commission recommendation to amend the Evidence Code to remove some of the protections of confidentiality as it pertains to mediation. While we fully support the notion that clients should be able to pursue redress in the case of potential attorney malpractice (even pertaining to the mediation process), we disagree with the methodology outlined by the proposed new law.

The unintended consequences of this proposed legislation are far reaching and harmful to everyday citizens, as well as mediation itself. Generally, individuals avail themselves of mediation to avoid the traumatic and expensive court process. The ability to resolve a conflict once and for all in a collaborative setting is core to the mediation process.

The proposal put forth by the Law Revision Commission guts the entire mediation process and creates an environment of mistrust and fear for individuals who might otherwise solve their problems outside the legal system. As such, they will remain in that system, further clogging our already overburdened courts.

At the outset, in light of full disclosure, mediators will have to inform parties to mediation that if anyone should decide to allege misconduct of their attorney, that any and all other parties could become part of a court process that may involve depositions, testimony in court, and the disclosure of their private mediation communications.

Our mediation program works with birth and adoptive families in the public child welfare system. We do over 4,500 mediations a year in concert with 48 California Counties.

For the safety of the traumatized children involved in child welfare, confidentiality is legally and morally mandatory for the parties to our mediations. If a birth parent feels that their court appointed attorney has mislead them in this process and decides to sue, the identities of all the parties will become known, placing children in potential danger as well as further victimizing the families (both birth and adoptive) involved.

If we have to tell parties that their ability to have a frank, open and confidential mediation discussion about the future of their children was out of their control in the event that one of the other parties alleged attorney malpractice, our clients' confidence, trust, and willingness to share important information with us and each other for the benefit of their children would be damaged. Ultimately, this hurts families, and protects very few attorney clients from a harm that is extremely rare, if existent at all.

We strongly urge the Law Revision Commission to take the recommendation of Conference of California Bar Association's original proposal as set forth in Resolution

10-6-2011. Specifically, to enact legislation that would make admissible mediation "communications directly between the client and his or her attorney only," not all mediation communications among all other parties and the mediator.

Kate Cleary Executive DirectorConsortium for Children
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August 31, 2017

TO: MEMBERS, CALIFORNIA LAW REVISION COMMISSION

FR: CONSUMER ATTORNEYS OF CALIFORNIA

CALIFORNIA DEFENSE COUNSEL

RE: TENTATIVE RECOMMENDATION—RELATIONSHIP BETWEEN MEDIATION

CONFIDENTIALITY AND ATTORNEY MALPRACTICE

OPPOSE

Consumer Attorneys of California and California Defense Counsel must jointly oppose the tentative recommendation released in June 2017. We deeply appreciate the efforts of the Commission and its staff in its multi-year review of the complicated issues involving mediation confidentiality. However, after reviewing the Commission's lengthy tentative recommendation, we do not believe the report provides empirical evidence of widespread abuse which compels statutory change.

While there are certainly reasonable arguments that have been made to restrict mediation confidentiality, on balance, there is no compelling need to weaken California's longstanding confidentiality protections. As the report acknowledges on page 106, "it seems reasonable to rely on the commonsense notions that people will speak more freely if they are confident their words will not be used to their detriment and negotiations are more likely to succeed if the participants are able to speak freely." In particular, California Defense Counsel points out that it is not clear whether the proffered language of Evidence Code 1120.5 is drafted in an even handed manner to permit contrary evidence that would allow attorneys to appropriately defend themselves.

Confidentiality promotes candor, which in turn leads to successful mediation. This is the fundamental reason for strong mediation confidentiality. Successful mediation encourages the widespread use of mediation, and the use of mediation is critical to successful out of court resolution of disputes. Therefore, we urge the Commission to reconsider its tentative recommendation.



Brian J. Stiger Director Los Angeles County Board of Supervisors Hilda L. Solis Mark Ridley-Thomas Sheila Kuehl Janice Hahn Kathryn Barger

September 1, 2017

Barbara Gaal
Chief Deputy Counsel
California Law Revision Commission
Via Email to bgaal@clrc.ca.gov

Re: Proposed Exception to Mediation Confidentiality and Community-Based Mediation

Dear Commission:

The Department of Consumer and Business Affairs (DCBA) is responding to the California Law Revision Commission's call for public response in regards to the proposed exception to mediation confidentiality and community-based mediation. Los Angeles County and DCBA operates a community-based mediation program that provides residents with a dispute resolution alternative to court. Our dispute resolution program has been successfully providing favorable outcomes to the residents of Los Angeles County since 1976 and DCBA is against the proposed exception for several reasons.

The proposed exception creates opportunities for "buyer's-remorse," and will be used as a loop-hole for parties to recant their agreement to stipulate. Additionally, the exception would expose the court system to frivolous claims, costing time and money. Parties that wish to retract their agreed upon stipulations may allege that attorneys provided legal advice to withdraw from the agreement, and this exception would give them the avenue to pursue that claim.

Furthermore, the community-based mediation programs that are funded under the Dispute Resolution Programs Act will be negatively affected if the proposed recommendation is passed. The recommendation will be particularly detrimental to community mediation program because one of the benefits of community mediation is the avoidance of the court systems. However, this exception would subject parties to court proceedings despite resolving their dispute through mediation. Thus, decreasing the value of mediation.

Moreover, the proposed recommendation would have a detrimental effect on the ability of community-based mediation programs to recruit, and keep vital volunteers.



Community-based mediation programs often run on "shoe-string" budgets with the help of numerous volunteer mediators. These volunteers consist of attorneys, judges, and other Samaritans that wish to serve the community. If subjected to subpoenas and possible court proceedings, citizens who would otherwise volunteer may not do so.

Therefore, the Los Angeles County Department of Consumer and Business Affairs stands against the proposed exception to mediation confidentiality and community-based mediation.

Best Regards,

Maritza Gutierrez

marita Gutierrez

Dispute Resolution Program Manager

Department of Consumer and Business Affairs



Barbara S. Gaal, Esq. Chief Deputy Counsel California Law Revision Commission 4000 Middlefield Rd., Room 0-1 Palo Alto, CA 94303

Re: Study K-402

Dear Ms. Gaal,

The Academy of Professional Family Mediators (APFM) is the premier national organization of Professional Family Mediators and is the successor to the former Academy of Family Mediators founded in the late 1970s. These organizations formed to assist clients to work outside of the constraints and procedural limitations of the court-based adversarial system. As an organization, APFM has established standards of practice for family mediators, while also supporting the teaching, training, and skill development of mediators, and to increase public awareness of mediation, specifically those families in transition. Professional Family Mediators focus on client-centered services that allow their clients to achieve mutually beneficial resolution of their issues in a way that minimizes conflict that is so damaging to children. This is who we are.

As an organization, and on behalf of our California members, APFM strongly opposes the proposed language change to the Evidence Code that is currently being considered, for the following reasons:

- 1) One of the major accelerants toward litigation is the failure of divorcing couples to communicate effectively with one another. Although these clients will universally proclaim how important their children are to them, and how much they want to protect their children from harm, those commitments fall by the wayside in the context of the parental relationship disputes. Litigation expands this rift in communication, whereas mediation narrows it and, in many cases, closes it altogether.
- 2), Litigation, as a process, is fraught with gamesmanship, riddled with attacks to invalidate the credibility of each of the parties, and results in exacerbating the mistrust between the parties. Mediation educates the clients to the fact that full disclosure and full examination of the issues and options for resolution will greatly enhance and expand the value of the settlement that can be achieved by their working together. Critical to these considerations is the bedrock principle embedded in the Evidence Code, that mediation is protected with a *cloak of confidentiality*. At the 2016 annual conference of the national Academy of Professional Family Mediators, a plenary speaker, who was an

expert in analytics, revealed that Google searches indicate that the one word which characterized the greatest number of searches in mediation was "confidentiality". This is the single most important concern of clients electing to participate in a mediated process to resolve their issues.

3) Everything in life comes at a cost. The goals or perceived benefits of the proposed law revision comes at an enormous cost to the future success of mediation as a profession and as an alternative to litigation. The greater good of encouraging and empowering clients to work out their own best agreements, with the help and guidance of trained professionals, mandates that the *confidentiality* of the process be preserved. This ensures the *single most desired characteristic* of the process for clients who seek the benefits it brings to their children and to their own custom-designed outcome.

The Academy of Professional Family Mediators, strongly urges the Law Revision Commission to reject the proposed change regarding confidentiality.

Respectfully submitted,

/s/ Stacey H. Langenbahn, J.D.

President of the Academy of Professional Family Mediators 3600 American Blvd. West, Suite 105 Minneapolis, MN 55431 +1 952-222-8048 www.APFMnet.org



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STANLEY S. BISSEY
EXECUTIVE DIRECTOR & CEO

August 18, 2017

California Law Revision Commission C/o Barbara Gaal, Chief Deputy Counsel 4000 Middlefield Road, Room D-2 Palo Alto, CA 94303

Re: Study K-402 - Mediation Confidentiality - Presently Proposed Legislation

Dear Commission & Ms. Gaal:

Supplementing our earlier letter of March 24, 2016, the California Judges Association Executive Board now responds to the CLRC's request for *Public Comment* on its proposed legislation dealing with changes to California's mediation confidentiality statutes. I have again been authorized to write to you in CJA's behalf.

We have also read thru all 156 pages of the Staff Report of June 2017.

Short version, we strongly oppose the proposed legislation in its present form.

As indicated in our March 24, 2016 letter, we believe that the public policy served by mediation confidentiality is of such great value in permitting the effective resolution of civil cases short of trial that it should be preserved. There is simply too little, if any, justification for the abrogation of confidentiality encompassed in the Commission's current legislative proposal.

To a great extent, we are guided by the six Justice plurality plus separate concurrence in the California Supreme Court decision in *Cassel v. Superior Court* (2011) 51 Cal. 4th 113. We certainly take note of Justice Chin's brief written concurrence and comment, which singular comment appears to be the genesis of the CLRC's current exercise in Study K-402.

The Supreme Court Justices found:

"[T]he mediation confidentiality statutes do not create a "privilege" in favor of any particular person. Instead, they serve the public policy of encouraging the resolution of disputes by means short of litigation. The mediation confidentiality statues govern only the narrow category of mediation-related communications, but they apply broadly within that category, and are designed to provide maximum protection for the privacy of communications in the mediation context. A principal purpose is to assure prospective participants

that their interests will not be damaged, first, by attempting this alternative means of resolution, and then, once mediation is chosen, by making and communicating the candid disclosures and assessments that are most likely to produce a fair and reasonable mediation settlement. To assure this maximum privacy protection, the legislature has specified that all mediation participants involved in a mediation-related communication must agree to its disclosure...."

"Moreover, as real parties observe, the Legislature might reasonably believe that protecting attorney-client conversations in this context facilitates the use of mediation as means of dispute resolution by allowing frank discussions between a mediation disputant and the disputant's counsel about the strengths and weaknesses of the case, the progress of negotiations, and the terms of a fair settlement, without concern that the things said by either the client or the lawyers will become the subjects against either." (Cassel excerpts @ 131-133; Emphasis Ours)

Although that six Justice plurality plus Justice Chin's concurrence also observed the obvious, that the legislature was free to reconsider whether or not the mediation confidentiality statutes should preclude the use of mediation-related attorney-client discussions to support a client's civil claims of malpractice against his or her attorneys, the six Justices did not themselves "recommend" such review. Only Justice Chin implicitly did.

Realizing that it was going to be probable that the Commission was going to make recommendations to the Legislature in some form that would at least in part abrogate mediation confidentiality, CJA then focused on protecting mediators' (retired judges or otherwise) presently existing *legal incompetence* from being compelled to testify and otherwise protecting mediators' writings, documents and the like from discovery or trial.

On pages 9 – 11 of her First Supplement to Memorandum 2017-30, Ms. Gaal points out portions of Staff Analysis more articulately than I did in my numerous appearances before the Commission over the past two years. These are things that should bear strong consideration in formulating your final proposal. I attempted to also present the same thoughts to you. These include, making sure a mediator is "left alone" re not having to provide discovery or evidence at trial; precluding a civil litigant from obtaining a mediator's electronic files from the mediator's ECS or RCS, i.e. not allowing a litigant or counsel to obtain through a back or side door what they cannot obtain through the front door; precluding disclosure of specific categories or evidence, from: all of a mediator's records relating to a mediation conducted by the mediator, to all oral or written communications made by a mediator in the course of a mediator and a mediation participant in the course of a mediation conducted by the mediator and a mediation participant in the course of a mediation conducted by the mediator.

In my discussions with you it was my sense that those concerns and the specificity needed to have them unambiguously set forth met favorably with recognition of their importance from a majority of the Commissioners if not all of you. However, the current *Tentative Recommendation*, for the most part, presents little more than vague and ambiguous language that, from a judicial perspective, provides no substantive guidance as to how it is to be implemented.

As I said to you on a number of the occasions I was before you, and I did so non-pejoratively, *lawyers are nothing if not creative!* Statutory protections of confidentiality, to be effective, must

CJA- Page 3

be articulated unambiguously so that the legislative intent as to the scope of those protections is not subject to reasonable debate. The current *Tentative Recommendation* fails to meet any such standard of specificity.

In summary, The California Judges Association remains deeply concerned that **any incursion** into the present statutory standards of mediation confidentiality will so seriously impair the frankness and candor needed for successful mediations that it must be avoided.

Additionally, California Rules of Court, Rule 3.854 (b) currently requires mediators to, "...At or before the outset of the first mediation session, a mediator must provide the participants with a general explanation of the confidentiality of mediation proceedings." (Emphasis ours.) It seems obvious that mediators will now, if your proposal is adopted, have to provide an additional explanation to parties at the outset of the mediation that whatever they or their lawyers say in the process of the mediation is no longer confidential and can be used in a legal malpractice case against their lawyer!

Rhetorically we ask, "What lawyer in his right (self-defensive mind) will want to bring clients to a civil mediation when the first thing their client is told is a reminder of their right to sue that very lawyer, that confidentiality of that communication does not apply, and they are being told that by an significant authority figure, whether a retired judge or other mediator? And imagine the questions such a mediator is likely going to have to try and answer when the client asks questions about that admonition.

The potential impact of having the hundreds, if not thousands of cases, now being settled in mediation each year coming back to the civil trial calendars of the courts of our state is staggering. Those courts don't have the economic funding to handle the work load they have now and can see little likelihood of any significant changes in the foreseeable future.

Given these concerns, we regret to advise you that, the California Judges Association will be opposing that proposed legislation if it remains in its present form.

On a personal note, if I may, I express my appreciation to the Commissioners and to Ms. Gaal for the warm, thoughtful and professional cordiality I have been extended on the multiple occasions I have had the pleasure of appearing before you. To/say it is greatly appreciated would be a gross understatement.

Thank you again for considering our views.

Yours very truly,

David W. Long

Judge of the Superior Court (Ret.)

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August 30, 2017

Barbara Gaal Chief Deputy Counsel California Law Revision Commission 4000 Middlefield Road, Room D-2 Palo Alto, CA 94303-4739 Also via email: bgaal@clrc.ca.gov

Dear Ms. Gaal:

This letter is written in response to the invitation for public comment on the proposed legislation in the June 2017 Tentative Recommendation of the Law Revision Commission with respect to Study K-402, Mediation Confidentiality.

Ever since the California Dispute Resolution Council was organized in 1994 as a not-for-profit membership corporation, its mission has been to advocate before the California Legislature, courts, and administrative agencies for fair, accessible, and effective alternative dispute resolution processes. CDRC's membership consists of individual neutrals, community dispute resolution organizations and providers of ADR services which, taken together, represent more than 15,000 California mediators and arbitrators. The positions expressed in this letter do not necessarily represent those of any particular member.

This letter consists of three parts. The first is to direct the attention of members of the Law Revision Commission to the consequences of approving the tentative recommendation and, accordingly, even at this stage of the process, to urge the Commission not to recommend legislation that would create any further exception to mediation confidentiality. The second is to urge that, if the Commission is determined to recommend any legislation, it adopt an alternative to the proposal that has been circulated for public comment. And the third is to submit specific comments on the proposed legislation.

What approval of the tentative recommendation would mean

Commissioners who are mediators or have been participants in mediation know and the other Commissioners should appreciate that confidentiality, i.e., the safeguard against mediation communications being used later against a party, is crucial to the willingness to participate in mediation and to the success of mediation in resolving disputes. Given there are more than 60,000 civil filings in California every year and that it is standard practice for courts throughout the state to urge mediation upon litigants, it stands to reason that thousands of mediations are conducted annually.

CDRC Administration

800 Wilshire Blvd., Suite 1200, Los Angeles, California 90017 Tel: 213-629-5700, Ext. 361 cpereyra@cpslawfirm.com www.cdrc.net

In the now 20 years or more since California's statute protecting mediation confidentiality became effective, only a handful of claims that mediation confidentiality prevented clients from pursuing claims against lawyers for malpractice in connection with mediation have resulted in appellate decisions. All of these cases were decided at the pleading level, not after a trial, so their records do not show any evidence that malpractice actually occurred. Anecdotal evidence of other such situations has been presented to the Commission. No hard data exists, but the overall number of cases in which mediation confidentiality has affected lawyer malpractice disputes must be insignificant in proportion to the number of mediations conducted. Moreover, the Commission has not heard presentations from both sides in the instances in which it heard anecdotal evidence. This one-sided evidentiary situation should not be a basis for a decision that claims of lawyer malpractice in connection with mediation occur often enough to justify a substantial exception to the important concept of mediation confidentiality.

The CDRC concedes that mediations will continue even if exceptions to mediation confidentiality are created as proposed in the recommendation circulated for public comment. However, if the Commission creates any exception to mediation confidentiality, the Commissioners need to recognize that the result will be to make mediation less useful and more expensive as a process for resolving disputes. Exceptions to mediation confidentiality will deter some parties from agreeing to mediation and will result in some cases not settling in mediation that otherwise would. Even in the present environment, parties are reluctant to reveal information crucial to the settlement of a case that may prejudice their litigation positions, and mediators must devote significant effort to persuading parties to be candid. With statutory exceptions to mediation confidentiality, parties will be more cautious in drafting and sharing mediation statements, and mediators will need to devote increased time and effort to persuading reluctant parties to share crucial information needed to get to the core of a dispute and establish a foundation for negotiating settlement. Time is money, and the more time mediators are required to devote to this effort, the more time lawyers and parties also are required to spend in any mediation conference.

If the Commission creates any exception to mediation confidentiality, the Commissioners also need to recognize that such action will increase the burden on the already stressed court system in three ways.

For one, there is likely to be an increase in claims of lawyer malpractice, even if there is no increase in meritorious cases. Parties tend to have unrealistic expectations about the outcome of litigation, and a party who is persuaded to settle on realistic terms in mediation, but who, as is often the case, is unable to accept responsibility for their agreement, would now be free to try imposing responsibility on its lawyer.

Secondly, the cases that would be deterred from going to mediation and the cases that would not settle in mediation because of exceptions to mediation confidentiality would remain in the courts.

And finally, the courts would be confronted with disputes over whether proposed evidence was or was not admissible pursuant to an exception to mediation confidentiality.

For all of the foregoing reasons, the CDRC urges the Commissioners to reflect on the decision making process that has led them to the proposal that has been circulated for public comment, to consider the consequences of creating any exception to mediation confidentiality and to decide not to recommend legislation that would create any new exception to mediation confidentiality.

An alternative proposal

If the Commission decides to recommend legislation to allay public concern about mediation confidentiality immunizing lawyers from claims of malpractice in connection with mediation, then the CDRC urges the creation of the narrowest available exception be recommended. This would be in the form of legislation like AB2025 introduced in 2012 that would have limited the exception from confidentiality by making only mediation communications between a lawyer and client admissible in a legal malpractice case involving the lawyer or a State Bar disciplinary proceeding based on professional negligence and would only involve the malpractice plaintiff, not other parties to the mediation.

Comments specifically concerning the tentative recommendation

If further consideration is to be given to the legislation proposed in the tentative recommendation, the CDRC believes the following modifications should be made.

- 1. The word "requirement" in line 9 on page 145 does not fit. It should be changed to "obligation."
- 2. Disputes between lawyers and clients concerning fees or costs or both often do not involve issues of lawyer malpractice. Arbitrators in mandatory fee arbitrations pursuant to Article 13 of Chapter 4 beginning with Section 6200 of the Business & Professions Code are to determine the reasonable value of services provided by the lawyer to the client involved and may consider claims of lawyer malpractice only to the extent they bear on reasonable value. Thus, the period at the end of proposed section 1120.5(a)(2)(C) on line 20 of page 145 should be deleted and the following clause should be added: ", provided the dispute raises an issue of malpractice by the lawyer."
- 3. The CDRC agrees with the concern described in the comments on lines 23-31 of page 146 that participants in mediation who are not involved in a malpractice dispute should have an opportunity to seek a protective order or oppose an overbroad discovery request before evidence involving them is sought. However, CDRC believes that a provision requiring that notice be given to such third party participants at the outset of a case involving a malpractice claim is premature.

Third party participants in mediation expect that by settling a dispute they have made peace. Their lives should not be disturbed unnecessarily. Even if a malpractice claim alleges mediation-related conduct, the case might well go away before there is any occasion to seek evidence from or about third party participants. Premature notice would unduly alarm them and be inconsistent with their interest in having achieved peace as the result of mediation. Moreover, the phrase "filing a complaint or cross-complaint" does not address the situation in which a malpractice dispute is the subject of arbitration, not litigation.

For all of the foregoing reasons, the CDRC believes proposed Section 1120.5(d) should be revised to delete the requirement for giving notice at the time of filing and instead to require that, before a party to a malpractice dispute may seek discovery from or offer evidence about or from a third party participant that would otherwise be protected by mediation confidentiality, the party must serve notice upon the third party participant and the third party participant must be afforded a reasonable opportunity to take steps to prevent improper disclosure of the mediation communications involved.

- 4. To forestall any judicial expansion of the exceptions to confidentiality, CDRC urges that the two sentences on lines 9-12 of page 146 be shifted from the proposed comments and inserted into the proposed legislation as Section 1120.5(a)(2)(D).
- 5. Finally, CDRC supports Section 1120.5(f). Incompetency to testify is crucial to mediator neutrality, which is the foundation upon which the utility of involving a mediator in efforts to resolve disputes is based.

Confidentiality has proved its value to helping parties resolve disputes, make peace, restore relations, and relieve court burdens in California through mediation for the past 20 years or more. Efforts to reduce its value should be approached with caution.

Very truly yours,

Charles Pereyra-Suatez

President



Family Law Section Los Angeles County Bar Association

1055 West 7th Street, Suite 2700) Los Angeles, CA 90017-2553

August 9, 2017

VIA Email and U.S. Mail

Barbara S. Gaal, Chief Deputy Counsel California Law Revision Commission 4000 Middlefield Road, Room D-2 Palo Alto, CA 94303-4739 bgaal@clrc.ca.gov

Tel: 213.627.2727

Committee of the Los Angeles County Bar Association

Re:

Dear Ms. Gaal,

Fax: 213.833.6717

www.lacba.org

The Los Angeles County Bar Association (LACBA) was founded in 1878 and is one of the largest voluntary bar associations in the country, with over 20,000 members. The Family Law Executive Committee oversees the Family Law Section of LACBA. We provide educational programs, networking, pro bono services, informational resources and public service, to name a few of our activities.

Opposition to the proposed Exception to Mediation Confidentiality

(proposed Ev. Code sec 1120.5), by the Family Law Executive

I am writing on behalf of the LACBA Family Law Executive Committee to voice our <u>unanimous</u> opposition to any exception to the absolute mediation confidentiality presently provided by Evidence Code secs. 1119 et seq.

Absolute confidentiality in mediation and pre-mediation planning is essential to promote the necessary candor in mediation that leads to successful settlements. As stated by our Appellate Court, the <u>amount</u> of a compromise is often "an educated guess of the amount that can be recovered at trial and what the opponent was willing to pay or accept".(Namikas v Miller (2014) 225 CA 4th 1574, 1583).

Creating an exception to mediation confidentiality for alleged attorney malpractice will, in our opinion, end family law mediation as we know it. Attorneys will be loath to make recommendations of compromise at their peril. Most family law clients are unhappy about their family situation, and an unhappy party to a settlement often suffers buyer's remorse. This proposed exception to mediation confidentiality is a recipe for financial disaster, not just for the parties involved and mediation attorneys, but for the court system which will necessarily be required to handle the burgeoning case load that was once served successfully by a mediation settlement.

We recommend that actual figures and statistics be collected and published by the CLRC, to determine whether there is, in fact, a problem with attorney malpractice in the mediation context, that would justify such a complete change to mediation confidentiality. We believe that the issue of "alleged attorney malpractice" in the mediation setting, when properly evaluated, will not

demonstrate a true malpractice "problem" that justifies such a complete, system wide change that would have disastrous chilling effects on our mediation system.

We think this action is not just unwise, but detrimental to our family law courts. It will have the unintended consequence of a huge financial impact on our courts, already limited by staggering budget shortfalls, causing further delay in obtaining justice for family law litigants.

Very truly your

Joseph P. Spirito, Jr., Chair, Family Law Section, LACBA

EMAIL FROM CHRISTOPHER WELCH, CENTER FOR CONFLICT RESOLUTION (9/1/17)

Re: California Law Revision — Confidentiality

Hello Barbara and Committee,

The Center for Conflict Resolution is a 501 (c) 3 non-profit that is based in Los Angeles County, primarily funded by two DRPA grants. One for the community and one for Dayof-Hearing in the Los Angeles County court. Last year our organization mediated roughly 2,900 cases. These almost entirely took place during the day-of-hearing with unrepresented litigants. The cases were primarily in Small Claims, Civil Harassment, and Unlawful Detainer jurisdictions and performed by volunteer mediators.

Most of our workload deals with the pro se/pro per clientele. Some of the UD and Civil Harassment cases of course have representation, but Small Claims hearings, do not allow representation by counsel during the court process. An expanding part of our workload is also working with individuals in the community. Resolving cases before their trial date, and ultimately working with parties before they ever file a case in the first place. A true goal for any community mediation organization when trying to bring peace in to the community.

Where does that leave our organization when it comes to an opinion about the revisions to confidentially? Well, it could have a major impact in the areas where we service constituents that do have counsel/representation. Each mediation would carry the potential that our organization would be brought in to a legal or adjudicative setting where potential documents or testimony would have to be given. This would prove potentially burdensome to the organization over time.

Our main concerns organizationally are that of exposure of time and liability. Even though we might serve 95% of the community that does not have counsel, the burden will remain on our organization to prove to malpractice insurance providers that we either have zero and/or limited exposure to attorneys in the process. The insurance premiums will potentially go up for all mediators in California after this is passed/approved. Mediators and mediation organizations will potentially be 'active' in the arena of testimony and discovery to the extent that everyday duties of the job will be put to a halt when an attorney complaint is filed and that attorney wants to serve the organization for records and potentially serve the mediator (or volunteer in our case) for testimony. There also is a fear, founded or unfounded, that finding potential malpractice coverage for a large community organization that has exposure to close to 3,000 cases will increase exponentially. The organization will be lumped in with these newly created professional mediator exposures even though our primary organization focus will remain the

unrepresented litigants. The underwriter might still require we pay a larger premium comparable to all mediators if we are not able to point to a carve out or an exception.

The concern of the unrepresented litigants in mediation are extremely important. Separately a regulated system might need to be put in place to listen to those concerns and respond accordingly. Organizationally, we just wanted to make it aware, if it has not already been stated, that for many Community Mediation organizations throughout the State, each organization will have to deeply consider whether or not they can service any case where representation of litigants is present. As administrators of community programs our budgets and time are already stretched so thin that the scope of service might have to be limited in order to respond to the outlying exposures.

Thank you,

Christopher Welch Executive Director Center for Conflict Resolution 7806 Reseda Blvd. Reseda, CA 91335 818.705.1090

EMAIL FROM ALECIA ALLISON-THOMAS (8/29/17)

Re: Mediation Confidentiality and Study K-402

Dear Chairperson Lee, Commissioners, and Staff,

I would like to express my opposition to the California Law Revision Commission's draft legislation regarding exceptions to mediation confidentiality. I am a Mediator with the Consortium for Children and our program works with 48 California Counties and their child welfare systems.

Mediation confidentiality is essential to effective and successful mediation, especially for the families in the child welfare system. The confidentiality currently enjoyed by all parties to a mediation (in my case Birth Parents, Prospective Adoptive Parents, Foster Parents, Relatives and Siblings) provides a safe environment to talk about the future of the child being placed for adoption and provide for safe and well thought out contact plans for the child and the families involved. With the possibility of legal action and parties being taken to court to testify, this "best practice" child welfare program will be irretrievably damaged if the current predictable confidentiality is weakened.

Doing away with that confidentiality through the proposed law revision would create circumstances that will be discouraging for adoptive parents, traumatic for families of origin, and extremely expensive for the legal system, as our mediation program currently results in substantial savings to the Courts and Social Services by preventing costly contested hearings and appeals.

That being said, I fully agree that a client should be able to pursue redress in the event of attorney malpractice. If an exception to confidentiality is established, I suggest the law should be narrowly tailored as depicted in the Conference of California Bar Association's original proposal as set forth in Resolution 10-6-2011. Specifically, to enact legislation that would make admissible mediation "communications directly between the client and his or her attorney only," not all mediation communications among all other parties and the mediator. If an exception is made to address potential attorney malpractice in mediation, this would be the best way, in my opinion, to address that issue while continuing to protect and foster frank discussions in mediation, an essential prerequisite to the settlement of disputes and the betterment of the children and families I serve.

Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Sincerely, Alecia Allison-Thomas Permanency Planning Mediator Consortium for Children

EMAIL FROM BARBARA ANSCHER (8/25/17)

Re: Mediation Confidentiality and Study K-402

Dear Chairperson Lee, Commissioners, and Staff,

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Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Sincerely, Barbara M. Anscher Arbitration and Mediation Services

Phone: (510) 387-4490; Fax: (510) 540-5937

EMAIL FROM COURTNEY BENNETT (8/25/17)

Re: Mediation Confidentiality and Study K-402

Dear Chairperson Lee, Commissioners, and Staff,

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Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Sincerely, Courtney Bennett Permanency Planning Mediator Consortium for Children

EMAIL FROM LUIS BU (8/31/17)

Re: Mediation Confidentiality and Study K-402

Dear Chairperson Lee, Commissioners, and Staff,

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Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Sincerely, Luis Bu Permanency Planning Mediator Consortium for Children

EMAIL FROM DEBBIE CATZ (8/26/17)

Re: Mediation Confidentiality and Study K-402

Dear Chairperson Lee, Commissioners, and Staff,

I would like to express my opposition to the California Law Revision Commission's draft legislation regarding exceptions to mediation confidentiality. I am a Mediator with the Consortium for Children and our program works with 48 California Counties and their child welfare systems.

Mediation confidentiality is essential to effective and successful mediation, especially for the families in the child welfare system. The confidentiality currently enjoyed by all parties to a mediation (in my case Birth Parents, Prospective Adoptive Parents, Foster Parents, Relatives and Siblings) provides a safe environment to talk about the future of the child being placed for adoption and provide for safe and well thought out contact plans for the child and the families involved. With the possibility of legal action and parties being taken to court to testify, this "best practice" child welfare program will be irretrievably damaged if the current predictable confidentiality is weakened.

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Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Sincerely,
Deborah R. Catz, M.S.W.
Permanency Planning Mediator
Consortium for Children

EMAIL FROM PATTY CHO (8/29/17)

Re: Mediation Confidentiality and Study K-402

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Sincerely, Patty Cho Permanency Planning Mediator Consortium for Children

EMAIL FROM AMY COHEN (8/29/17)

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Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Sincerely, Amy S. Cohen Permanency Planning Mediator Consortium for Children, 1.415.506.8963, amycohen339@gmail.com

EMAIL FROM BRIGITTE DUTIL (8/29/17)

Re: Mediation Confidentiality and Study K-402

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Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Sincerely, Brigitte Dutil Permanency Planning Mediator Consortium for Children

EMAIL FROM ALLISON EDWARDS (8/25/17)

Re: Mediation Confidentiality and Study K-402

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Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Sincerely, Allison Edwards Administrative Assistant Consortium for Children, (415) 491-2200

EMAIL FROM RITU ESBJORN (8/25/17)

Re: Mediation Confidentiality and Study K-402

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Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Sincerely, Ritu Esbjorn, PhD Permanency Planning Mediator Consortium for Children

EMAIL FROM DANA MCKNIGHT FLENTROY (8/28/17)

Re: Mediation Confidentiality and Study K-402

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Sincerely,

Dana McKnight Flentroy Permanency Planning Mediator Consortium for Children

In Gratitude,

Dana

Dana McKnight Flentroy, M.S.W. www.yourfamilywhisperer.com dana@yourfamilywhisperer.com 916-801-9848

EMAIL FROM KATHY GREENE (8/27/17)

Re: Mediation Confidentiality and Study K-402

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Sincerely, Kathy Greene, MFT Permanency Planning Mediator Consortium for Children

EMAIL FROM RAJMEET GREWAL (8/29/17)

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Sincerely, Rajmeet Grewal, (209) 404-3401 Permanency Planning Mediator Consortium for Children

EMAIL FROM CINDY HALLIDAY-SCHULTE (8/27/17)

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Sincerely, Cindy Halliday-Schulte Permanency Planning Mediator Consortium for Children, (530) 908-6942

EMAIL FROM DENA HARTLEY (8/30/17)

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Sincerely,

Dena Hartley, MA Permanency Planning Mediator Consortium for Children

EMAIL FROM LATASHA JONES (8/30/17)

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Sincerely, LaTasha Jones, MSW Permanency Planning Mediator Consortium for Children, lyj01@mail.fresnostate.edu

EMAIL FROM LESLIE KALMBACH, J.D. (8/25/17)

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Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Sincerely, Leslie Kalmbach J.D. Permanency Planning Mediator Consortium for Children, (559) 709-0546

EMAIL FROM MARCIA KAMIYA-CROSS (8/25/17)

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Please know that it has been my personal experience several times over that the confidentiality promised in mediation has made it possible for both birth and adoptive families to engage, including children 12 and over. Not having to monitor their feelings, their fears, their past and current experiences has made it possible for people to set the past in the past and look toward a future that holds hope and continued connection.

Without the promise of confidentiality, I know that many adoptions would have been contested and the court process continued to the cost of the State and the best interests of the children.

Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Sincerely,

Marcia Kamiya-Cross Permanency Planning Mediator Consortium for Children

Marcia Kamiya-Cross P.O. Box 764 Oakhurst, CA 93644 (559) 760-3009

Consortium for Children 45 Mitchell Blvd, Suite 1 San Rafael, CA 94903 888.633.1411

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Marcia Kamiya-Cross Mediator with Consortium for Children (559) 760-3009

Consortium for Children 45 Mitchell Blvd, Suite 1 San Rafael, CA 94903 888.633.1411

EMAIL FROM SHARON KATAKURA (8/28/17)

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Sincerely, Sharon Katakura, MSW Permanency Planning Mediator Consortium for Children

EMAIL FROM MARIE LE (8/25/17)

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Sincerely, Marie Lan Le Permanency Planning Mediator Consortium for Children

EMAIL FROM HOURIG MARDIROSSIAN (8/28/17)

Re: Mediation Confidentiality and Study K-402

Dear Chairperson Lee, Commissioners, and Staff,

I would like to express my opposition to the California Law Revision Commission's draft legislation regarding exceptions to mediation confidentiality. I am a Mediator with the Consortium for Children and our program works with 48 California Counties and their child welfare systems.

Mediation confidentiality is essential to effective and successful mediation, especially for the families in the child welfare system. The confidentiality currently enjoyed by all parties to a mediation (in my case Birth Parents, Prospective Adoptive Parents, Foster Parents, Relatives and Siblings) provides a safe environment to talk about the future of the child being placed for adoption and provide for safe and well thought out contact plans for the child and the families involved. With the possibility of legal action and parties being taken to court to testify, this "best practice" child welfare program will be irretrievably damaged if the current predictable confidentiality is weakened.

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That being said, I fully agree that a client should be able to pursue redress in the event of attorney malpractice. If an exception to confidentiality is established, I suggest the law should be narrowly tailored as depicted in the Conference of California Bar Association's original proposal as set forth in Resolution 10-6-2011. Specifically, to enact legislation that would make admissible mediation "communications directly between the client and his or her attorney only," not all mediation communications among all other parties and the mediator. If an exception is made to address potential attorney malpractice in mediation, this would be the best way, in my opinion, to address that issue while continuing to protect and foster frank discussions in mediation, an essential prerequisite to the settlement of disputes and the betterment of the children and families I serve.

Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Sincerely, Hourig Mardirossian Permanency Planning Mediator Consortium for Children

EMAIL FROM BARBARA MATTHEWS (8/30/17)

Re: Mediation Confidentiality and Study K-402

Dear Chairperson Lee, Commissioners, and Staff,

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Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Sincerely, Barbara Matthews Permanency Planning Mediator Consortium for Children, (714) 926-3562

EMAIL FROM CHANIN MICHAEL (8/26/17)

Re: Mediation Confidentiality and Study K-402

Dear Chairperson Lee, Commissioners, and Staff,

I would like to express my opposition to the California Law Revision Commission's draft legislation regarding exceptions to mediation confidentiality. I am a Mediator with the Consortium for Children and our program works with 48 California Counties and their child welfare systems.

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Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Sincerely, Chanin Michael Permanency Planning Mediator Consortium for Children, 888-633-1411, 707-477-8045 (cell)

EMAIL FROM ELIZABETH MOMEN (8/29/17)

Re: Mediation Confidentiality and Study K-402

Dear Chairperson Lee, Commissioners, and Staff,

I would like to express my opposition to the California Law Revision Commission's draft legislation regarding exceptions to mediation confidentiality. I am a Mediator with the Consortium for Children and our program works with 48 California Counties and their child welfare systems.

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Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Sincerely, M. Elizabeth Momen, LCSW Permanency Planning Mediator Consortium for Children

EMAIL FROM DEBORAH MOODIE (8/31/17)

Re: Mediation Confidentiality and Study K-402

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Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Sincerely,
Deborah Moodie, MA
Permanency Planning Mediator
Consortium for Children, 949-922-3757

EMAIL FROM VARINKA MULDAWER (8/29/17)

Re: Mediation Confidentiality and Study K-402

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Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Sincerely, Varinka M. Muldawer MA LMFT Permanency Planning Mediator Consortium for Children

EMAIL FROM SUZANNAH NOCH (8/25/17)

Re: Mediation Confidentiality and Study K-402

Dear Chairperson Lee, Commissioners, and Staff,

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Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Sincerely, Suzannah E. Noch, MSW, LCSW Permanency Planning Mediator Consortium for Children

EMAIL FROM JOSIE PLASCENCIA (8/30/17)

Re: Mediation Confidentiality and Study K-402

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Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Sincerely, Josefina Plascencia Permanency Planning Mediator Consortium for Children

EMAIL FROM ANNA REYES (9/1/17)

Re: Mediation Confidentiality and Study K-402

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Sincerely, ANNA REYES Permanency Planning Mediator Consortium for Children

EMAIL FROM KERI SALDANA (8/29/17)

Re: Mediation Confidentiality and Study K-402

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Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Sincerely, Keri Saldana, (714) 720-8984 Permanency Planning Mediator Consortium for Children

EMAIL FROM DANA SARMIENTO (8/25/17)

Re: Mediation Confidentiality and Study K-402

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Sincerely,
Dana Sarmiento
Permanency Planning Mediator
Consortium for Children

EMAIL FROM TERESA SERRANO (8/29/17)

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Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Sincerely, Teresa Serrano Permanency Planning Mediator Consortium for Children

EMAIL FROM SUSAN SHER (8/30/17)

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Sincerely, Susan Sher Permanency Planning Mediator Consortium for Children

EMAIL FROM NAOMI STAL (8/31/17)

Re: Mediation Confidentiality and Study K-402

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Sincerely,

Naomi T. Stal, Esq. Permanency Planning Mediator Consortium for Children

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Naomi T. Stal O: 707-622-5295 C: 310-770-2869 Permanency Planning Mediator, Contracted by Consortium for Children

EMAIL FROM BARBARA STERBENTZ (8/29/17)

Re: Mediation Confidentiality and Study K-402

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Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Sincerely, Barbara Sterbentz Permanency Planning Mediator Consortium for Children

EMAIL FROM LUANNE STOCKS (8/29/17)

Re: Mediation Confidentiality and Study K-402

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Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Sincerely, Luanne Stocks Permanency Planning Mediator Consortium for Children

EMAIL FROM MELISSA TAPPIS (8/30/17)

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Doing away with that confidentiality through the proposed law revision would create circumstances that will be discouraging for adoptive parents, traumatic for families of origin, and extremely expensive for the legal system, as our mediation program currently results in substantial savings to the Courts and Social Services by preventing costly contested hearings and appeals.

That being said, I fully agree that a client should be able to pursue redress in the event of attorney malpractice. If an exception to confidentiality is established, I suggest the law should be narrowly tailored as depicted in the Conference of California Bar Association's original proposal as set forth in Resolution 10-6-2011. Specifically, to enact legislation that would make admissible mediation "communications directly between the client and his or her attorney only," not all mediation communications among all other parties and the mediator. If an exception is made to address potential attorney malpractice in mediation, this would be the best way, in my opinion, to address that issue while continuing to protect and foster frank discussions in mediation, an essential prerequisite to the settlement of disputes and the betterment of the children and families I serve.

Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Sincerely, Melissa Tappis Permanency Planning Mediator Consortium for Children

EMAIL FROM ELISE THOMPSON (8/26/17)

Re: Mediation Confidentiality and Study K-402

Dear Chairperson Lee, Commissioners, and Staff,

I would like to express my opposition to the California Law Revision Commission's draft legislation regarding exceptions to mediation confidentiality. I am a Mediator with the Consortium for Children and our program works with 48 California Counties and their child welfare systems.

Mediation confidentiality is essential to effective and successful mediation, especially for the families in the child welfare system. The confidentiality currently enjoyed by all parties to a mediation (in my case Birth Parents, Prospective Adoptive Parents, Foster Parents, Relatives and Siblings) provides a safe environment to talk about the future of the child being placed for adoption and provide for safe and well thought out contact plans for the child and the families involved. With the possibility of legal action and parties being taken to court to testify, this "best practice" child welfare program will be irretrievably damaged if the current predictable confidentiality is weakened.

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Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Sincerely, Elise Thompson, MS LMFT Permanency Planning Mediator Consortium for Children

EMAIL FROM MARGOT UMEMOTO (8/28/17)

Re: Mediation Confidentiality and Study K-402

Dear Chairperson Lee, Commissioners, and Staff,

I would like to express my opposition to the California Law Revision Commission's draft legislation regarding exceptions to mediation confidentiality. I am a Mediator with the Consortium for Children and our program works with 48 California Counties and their child welfare systems.

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Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Sincerely, Margot Umemoto, 714.270.7043 Permanency Planning Mediator Consortium for Children

EMAIL FROM EVA WEXLER (8/30/17)

Re: Mediation Confidentiality and Study K-402

Dear Chairperson Lee, Commissioners, and Staff,

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Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Sincerely, Eva Wexler LCSW Permanency Planning Mediator Consortium for Children

EMAIL FROM BARBARA WHITE (8/25/17)

Re: Mediation Confidentiality and Study K-402

Dear Chairperson Lee, Commissioners, and Staff,

I would like to express my opposition to the California Law Revision Commission's draft legislation regarding exceptions to mediation confidentiality. I am a Mediator with the Consortium for Children and our program works with 48 California Counties and their child welfare systems.

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Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Sincerely, Barbara White Permanency Planning Mediator Consortium for Children

EMAIL FROM SUSAN YOBP (8/25/17)

Re: Mediation Confidentiality and Study K-402

Dear Chairperson Lee, Commissioners, and Staff,

I would like to express my opposition to the California Law Revision Commission's draft legislation regarding exceptions to mediation confidentiality. I am a Mediator with the Consortium for Children and our program works with 48 California Counties and their child welfare systems.

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Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Sincerely,
Susan Yobp
Permanency Planning Mediator
Consortium for Children

Susan Yobp, Mediation Coordinator Permanency Planning Mediation Consortium for Children 45 Mitchell Blvd, Suite 1 San Rafael, CA 94903 415-491-2415

EMAIL FROM LISA BASS (6/29/17)

Re: Do not add Section 1120.5 to the Evidence Code

Law Revision Commission,

I oppose removing our current mediation confidentiality protections, and here are the letters I've sent to my legislators in efforts to save our mediation process from becoming severely impeded.

As a mediators dedicated to bringing parties to successful resolution, your proposed new law threatens future success for parties to reach their own agreements and settle their cases out of court!

Sincerely, Lisa Bass

Lisa Bass 39 Boardman Place, #205 San Francisco, CA 94103

June 29, 2017

Senator Scott Wiener 455 Golden Gate Avenue Suite 14800 San Francisco, CA 94102

Dear Senator Wiener,

I'm asking you to tell the Law Revision Commission that you oppose its pending bill to take away the right to choose a confidential mediation (Study K-402).

Since you attended the San Francisco Community Boards Peacemaker Award Luncheon, you seem to be an advocate for furthering peacemaker work. As an actively practicing mediator helping parties to reach agreeable resolutions to their disputes/conflicts outside of the courts, I know the importance of today's mediation confidentially protection. Without confidentially protection as an optional part of the process, future success will be severely impacted.

It has been brought to my attention that a majority on the current California Law Revision Commission is planning to recommend removing our current mediation confidentiality protections by adding a new Section 1120.5 to the Evidence Code. Please oppose this!

Sincerely,

Lisa Bass

cc: California Law Revision Commission

Lisa Bass 39 Boardman Place, #205 San Francisco, CA 94103

June 29, 2017

Assemblymember David Chiu 455 Golden Gate Avenue Suite 14300 San Francisco, CA 94102

Dear Assemblymember Chiu,

I'm asking you to tell the Law Revision Commission that you oppose its pending bill to take away the right to choose a confidential mediation (Study K-402).

It has been brought to my attention that a majority on the current California Law Revision Commission is planning to recommend removing our current mediation confidentiality protections by adding a new Section 1120.5 to the Evidence Code. Please oppose this!

As a mediator helping parties to reach agreeable resolutions to their disputes/conflicts outside of the courts, I know a loss of mediation confidentially would mean a loss of this process being enable for future success!

Sincerely,

Lisa Bass

cc: California Law Revision Commission

EMAIL FROM CARI S. BAUM (8/28/17)

Re: K-402 Mediation Confidentiality — Opposition

Ms. Gaal,

I have been a licensed California attorney since 1990. For the last 10 years my practice has solely been providing mediation services.

I write this email in response to the CLRC request for Public Comment.

I strongly oppose the proposed legislation in its present form.

The integrity of the mediation process must be preserved. Confidentiality is necessary for frank and open conversations. The proposed legislation is detrimental to the mediation process and unnecessary.

Best Regards,

Cari S. Baum, Esq., LL.M.

EMAIL FROM JEANNE BEHLING (8/29/17)

Re: K-402 Mediation Confidentiality — Opposition to Changes

Ms. Gaal,

I object to the proposed changes to Mediation Confidentiality. The changes are vague, the notice provisions alone breach the confidentiality and there is a huge potential that enacting these provisions will cause additional litigation which is a burden to the courts in California.

The current Evidence Code serves California well. I think Mediation Confidentiality is too important to change.

Thank you,

Jeanne Behling

EMAIL FROM GILLIAN BRADY (6/29/17)

Re: Mediation Confidentiality

Dear Sir or Madam.

I have been a mediator since 2004 and have mediated hundreds of cases. I have been a licensed attorney since 1999 and was a litigator before opening my mediation practice, and I can see all sides in this debate. It is my opinion that confidentiality lies at the heart of a successful mediation. I urge you to listen to the voices of the experienced mediators who are expressing their concerns about the potential overreach of any law that would put a damper on confidentiality at the mediation table.

If an exception to confidentiality is established, I suggest the law should be narrowly tailored as outlined in the Conference of California Bar Association's original proposal set forth in Resolution 10-6-2011. Specifically, to enact legislation that would make admissible mediation "communications directly between the client and his or her attorney only," not all mediation communications among all other parties and the mediator. If an exception is made to address potential attorney malpractice in mediation, this would be the best way in my opinion to address that issue while continuing to protect and foster frank discussions in mediation, an essential prerequisite to the settlement of disputes. Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Respectfully submitted,

Gillian Brady Attorney & Mediator

Finding Common Ground Mediation & Law Services 430 D Street
Davis, CA 95616
(530) 756-2536
FindingCommonGround.com

EMAIL FROM DANIEL J. COOPER (8/29/17)

Re: K-402 Mediation Confidentiality — Opposition to Changes

Ms. Gaal,

I object to the proposed changes to Mediation Confidentiality.

The current Evidence Code serves California well. Confidentiality is too important.

Yours sincerely,

Daniel J. Cooper

Daniel J. Cooper, Esq.
Law Offices of Daniel J. Cooper
A professional corporation
24012 Calle de la Plata, Suite 410
Laguna Hills, CA 92653
Tel. (949) 859-8456 FAX (949) 859-6823
DJC@Dcooperlaw.com
WWW.DANIELJCOOPER.COM

EMAIL FROM GWEN EARLE (9/1/17)

Re: K-402 Mediation Confidentiality — Opposition to Changes

Ms. Gaal,

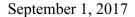
The purpose of this message is to inform you that I disagree with the proposed changes to the Mediation Confidentiality. The reason is the current Evidence Code serves California well. Confidentiality is very important.

Sincerely,

Gwen Earle

Email: gwenearle8@gmail.com

Tel: 949-291-0317





Ms. Barbara Gaal, Esq. Chief Deputy Counsel California Law Revision Commission 4000 Middlefield Road Palo Alto, California 94303

by eMail: BGaal@clrc.ca.gov

Re: Opposition to CLRC's Current Proposal for Changing Mediation Confidentiality, K 402

Dear Ms. Gaal,

Over the last several years, the CLRC has been holding open hearings on the Study K-402 which was initiated to address the challenges implied by dicta in a concurring opinion in *Cassel*. Over the course of these hearings, the Commission has been gracious in their willingness to listen to opposing testimony. Over 3500 pages of analysis has been compiled by the experienced and capable staff.

However, despite all of this diligent and professional work, the Commission has not been able to adequately balance the recognized public policy interests of maintaining effective private mediation and resolving what are perceived to be abusive practices.

It really is not surprising.

<u>Confidence in mediation is fragile.</u> Only when Parties can freely express their private beliefs is resolution possible. Exposing these private beliefs in public is a risk that many simply will not accept. While this is particularly poignant in family law, in commercial law, exposure of trade secrets and other proprietary information can be just as sensitive.

Understanding of Professional Mediation is uneven. First, it is NOT compulsory. The Parties freely and independently choose the Mediator. And, they can withdraw at any time. The role of the Mediator is as a facilitator and certainly not a Judge, not a trier of fact, really a person who has no actual authority beyond that freely granted by the Parties. If there is "case evaluation," it generally is requested by the Parties and is offered for their consideration, to accept or reject. And, all information that is not otherwise required or does not relate to a future crime, is strictly confidential. Anything that does not adhere to these principles should not be considered Professional Mediation.

Information about problems with Mediation is completely anecdotal. While there are a few examples that have been reported (Marriage of Wolf), these reflect extremely exceptional cases which reflect a failure to adhere to the principles of Professional Mediation. The reports from the "astro turf" campaign are easily dismissed as distractions; failure to settle a neighborhood tree dispute for \$30,000, concern over the well being of a pet dog and a groomers action to prevent animal abuse, a child support claim that \$7000 per month would not be adequate to maintain the child resulting from a one-night relationship where a more favorable venue was sought are all anomalies which do not reflect a fault in Professional Mediation as much as they reflect misinformation and false expectations (examples detailed elsewhere).

Without objective information, the Commission has apparently focused on the superficially easy target, the attorneys. What results is another "gotcha game," which sets so many traps for the unwary that Mediation becomes a risky adventure as opposed to an effective tool.

Retribution for being accused of error is the current theme of the current proposal. GOTCHA! Unfortunately, in setting up these trip wires, the essence of Professional Mediation is lost. At times, unintended consequences can be predicted:

- A. The current proposal limits it's GOTCHA to attorneys in mediation. Most mediations occur without court involvement. One need not be an attorney. Abusive situations may be more likely when the untrained and unlicensed engage in what they call mediation. There are no standard expectations for Professional Mediation as might be possible with a Standardized Pre-Mediation Agreement providing Informed Consent. The unsuspecting (Marriage of Wolf) may be deceived by such practices by unprofessional mediators conducting sham mediations and yet this proposal offers no solution; Informed Consent directly addresses the possibility of deception.
- B. The current proposal requires the disclosure of confidential information on the mere accusation of malfeasance. Accusations have a low threshold. They need not be based in fact. The purported solution to maintain confidentiality is to get a "protective order." Of course, to get the protection of such an order, wouldn't you have to disclose something that should be confidential? GOTCHA! And, what does that cost? GOTCHA! And, who pays? GOTCHA!

- C. Those not involved in the accusation are also subject to a GOTCHA! Confidential information owned by other than a Party to this new dispute risk having their private information exposed. GOTCHA! Of course, they can also request a protective order after they disclose what they want to protect. GOTCHA! And, what does that cost? And, who pays? GOTCHA! GOTCHA! And, they get a chance to protect themselves after they receive notice; by the way, there is no real requirement to give notice. GOTCHA!
- D. Even Mediators, who are nominally protected have their own GOTCHA! Information that Mediators have in their files or have transmitted to the Parties may not be protected. GOTCHA! And, Mediators who might like to protect both this confidential information and the integrity of the process need not be provided notice. GOTCHA!
- E. Mere accusation of malfeasance is a low bar. Such accusations have been used, not to redress a harm, but to gain tactical advantage. Adding the threat of a GOTCHA as negotiating leverage may make this type of abuse of process much more likely.
- F. Malfeasance, as interpreted by the Commission, includes a panoply of possibly bogus accusations. Who couldn't conjure up a fee dispute? A misunderstanding of terms? In a stressful situation, a feeling of being pressured? GOTCHA! Informed Consent would be a more effective solution to prevent problems rather that setting the stage for possible (and possibly bogus) fee disputes, feigned disclosure confusion and feelings of being coerced.
- G. Under these proposed rules, who would enter the Mediation Arena? Really sensitive, confidential information would be withheld. Participants, who are not subject to this set of "Attorneys only" GOTCHA trip wires, would be free to cause unfettered havoc. Professional Mediation would be a memory.
- H. And, if Professional Mediation becomes either less available or less attractive, what happens next? Anticipated disasters include:
 - Even more burdens on our tragically underfunded courts,
 - Additional costs to the courts, parties and the public at large,
 - Crowding in the courts, denying people access to Justice,
 - Loss of privacy; public exposure of extremely personal and private information,
 - Bogus claims of malfeasance for tactical advantage, and
 - "Settler's Remorse" impacting the stability of legitimate settlements.

Triggering all of this re-evaluation of Mediation Confidentiality was Justice Chin's lament in the dicta of his concurring opinion in <u>Cassel v Super. Ct.</u> 51 Cal. 4th 113. The court's majority (including Chin) upheld Mediation Confidentiality in <u>Cassel</u> noting the advantages of a clear public policy. Ultimately, Cassel was able to prevail in getting relief without the protected confidential information requested.

Where was the harm? I'm confused. Even Justice Chin admitted "I emphasize that I am not suggesting there was any malpractice or deception in this case." So, even by this skeptical, respected jurist, there was no suggestion of malfeasance. His lament was apparently based on pure speculation. *Woulda, Shoulda, Mighta, Coulda*.

But Justice Chin's lament continues: "There may be <u>better ways to balance the competing interests</u> than simply providing that an attorney"s statements during mediation may never be disclosed." "... it might 'not be fair to allow a client to <u>support a malpractice claim with excerpts from private discussions with counsel concerning the mediation, while barring the attorneys from <u>placing such discussions in context by citing communications</u> within the mediation proceedings themselves."</u>

In response to Justice Chin, after three (3) years and 3,500 pages of analysis, the answer to his musing in dicta is "Haven't been able to find a better solution yet." The prior work done by the CLRC in establishing our current Evidence Code was solid. At each alternative, the potential problems overcome the likely benefit.

The majority in *Cassel*, including Justice Chin, held the following:

- The mediation confidentiality statutes do not create a "privilege" in favor of any particular person.
- Instead, they serve the public policy of encouraging the resolution of disputes by means short of litigation.
- The mediation confidentiality statutes govern not only the narrow category of mediation-related communications, but they apply broadly within that category, and are designed to provide maximum protection for the privacy of communications in the mediation context.
- A principal purpose is to assure prospective participants that their interests will
 not be damaged, first, by attempting this alternative means of resolution, and then,
 once mediation is chosen, by making and communicating the candid disclosures
 and assessments that are most likely to produce a fair and reasonable mediation
 settlement.

• To assure this maximum privacy protection, the Legislature has specified that all mediation participants involved in a mediation-related communication must agree to its disclosure.

AMEN

Yes, Justice Chin, there may be ways of exposing what few problems may exist. But, as the full concurring opinion clearly points out (to which you also agreed), there are overriding public policy benefits to honest and open communications that are fostered by shielding such confidential communications from public exposure.

Like other privacy protections and evidentiary exclusions, there are fundamental principles which support our civilized society. Clergy-penitent confidentiality, Spousal privileges, Attorney client confidentiality, the Miranda decision, the 4th and 5th Amendments of the US Constitution all allow the possibility for some civil wrong to slip by. And yet, based on sound public policy considerations, privacy has been upheld and enshrined in no less important document than the California State Constitution.

California's Constitutional Right of Privacy, enacted by public referendum in the 1970's, clearly expresses the **inalienable right of privacy**:

"All people are by nature free and independent and have <u>inalienable rights</u>. Among these are ... privacy."

While several of us in the ADR Community are opposed to the current proposal, we take some comfort in the Commission's continuing willingness to graciously accept challenging commentary and adverse testimony.

I hope that over the course of our opposition, the Commission has come to realize that the ADR profession attracts principled problem solvers. And, our concerns have been with the integrity of the conduct of Mediation and the continued reliance on its fundamentals including Mediation Confidentiality.

Some have implied that Mediators who oppose are merely protecting their personal practice interests. I don't believe this to be true. The concerns presented by opponents to the CLRC proposal generally reflect concern over the abandonment of principled confidential mediation.

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Specifically, the professional ADR community has for many years maintained the practice of informed consent in the form of Pre-Mediation Agreements. Had this practice been more widespread, the concerns that resulted in the implications of Study K-402 could have been forestalled.

Recognizing that Informed Consent may be both more effective and less problematic than the current CLRC proposal, the ADR community has vetted a more comprehensive standard Pre-Mediation Agreement, which could be incorporated into the Evidence Code in lieu of the current proposal.

Among the benefits of the Pre-Mediation Agreement approach are the universal applicability (not limited to attorneys) and the opportunities for education and reassurance to those anticipating Mediation. As you can see from the attached example, a comprehensive Informed Consent process is possible.

Key components of this Informed Consent approach would include:

- Defining Mediation as a Non-Compulsory Process, where a Party can withdraw at any time they may be feeling pressured,
- Setting Guidelines for what has been called "Evaluative Mediation," allowing it only with the consent of the Parties, and reinforcing its advisory and non-compulsory context,
- Requiring that Mediators be selected by all Parties to the process and not by one side, suggesting a conflict of interest,
- Advancing the opportunity of the Parties to obtain full disclosure of the credentials and conflicts of the Mediators, and
- Protecting the Constitutional Right of privacy.

Many of us have grave concerns with the current CLRC proposal, founded in our professional experience and training. However, we can also take comfort that such possible changes are being considered in an open forum and not by administrative fiat. Without such openness, the negative consequences of such proposals would never surface.

Our system is strengthened by open deliberative processes at the Commission level, with the Legislature and through the Executive Branch. In many respects, America is Already Great (Again).

The previously proposed Pre-Mediation Agreement alternative, providing informed consent to all mediation (involving non-attorneys as well), is attached for your re-consideration.

Thank you for your courtesy.

Sincerely,

Robert J. Flack, Esq.

PROPOSED STANDARD PRE-MEDIATION AGREEMENT OUTLINE OF ISSUES

Consumer Notice and Protection in Mediation.

The confidentiality of the private settlement of disputes is supported by long standing tradition and the California Constitutional Right to Privacy. In California, people have the "inalienable right" to privacy in the management of their personal relationships including their disputes.

The purpose of this Agreement is to provide consumer education and notice concerning the character of the Mediation Process. Parties engaging in Mediation, while benefitting from a confidential process, lose the opportunity to use any information gained in Mediation for any other purpose than the Mediation itself.

Where any individuals or natural persons are Parties in Mediation, this Agreement provides PreMediation notice which informs those Parties of their expectations, rights and limitations as before they engage in confidential Mediation to resolve their issues.

Specifically:

- 1. The Mediator in the Mediation is a Neutral who has been selected and retained jointly by all Parties to the dispute. The Parties have been provided sufficient opportunity to inquire about the Neutral's professional experience and background and do not object.
- 2. The Parties may retain counsel to prepare for or to participate in Mediation (with the advanced consent of the Mediator).
- 3. The Parties have been advised that:
 - a. Their participation in Mediation is voluntary and they may withdraw from Mediation at any time for any reason.
 - b. Any settlement agreement resulting from Mediation:
 - i. shall be consensual and not compulsory,
 - ii. shall be in a writing that verifies that it is intended to be enforced, unless it is an oral agreement which strictly complies with the provisions of Evid. Code Sec. 1118,
 - iii. should an attorney fee agreement be modified as part of any settlement, it shall also be in a writing that verifies that it is intended to be enforced, and
 - iv. to be disclosed (and enforced), any agreement shall comply with the provisions of Evid. Code Sec. 1123.

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- c. The Mediator's role is limited to facilitating the Parties' resolution of their issues.
 - i. The Mediator has no authority to determine the resolution of any case.
 - ii. The Mediator shall not act as a representative, advocate or legal advisor for any Party.
 - iii. The Mediator may express opinions on the applicability of the law to the facts to the extent that such opinions, in the judgment of the Mediator and consent of the Parties, may be helpful in facilitating a settlement.
 - iv. The Mediator shall not provide legal advice.
 - v. The Parties agree they will rely solely on their on their own judgment with the advice of their own attorneys in arriving at a resolution of their dispute.
 - vi. Unless specifically requested by all Parties (in writing), the Mediator shall not offer any case evaluation (or preliminary adjudication) which could be interpreted as conclusive or coercive rather than as merely advisory.
- d. Mediations are confidential.
 - i. The Parties may choose to rely only on admissible evidence (information that would otherwise be admissible and not subject to the Mediation Confidentiality of Evid. Code 1115 et. seq).
 - ii. Absent a specific agreement, any information may be considered in Mediation.
 - iii. The privileged character of any information is not altered by its disclosure in Mediation.
 - iv. The Mediator cannot be compelled to disclose any information received in any form related to the Mediation.
- e. All statements made during the course of Mediation are confidential and privileged settlement discussions, are made without prejudice to any party's legal position, and are inadmissible for any purpose in any legal proceeding.
 - i. These offers, promises, conduct and statements:
 - (1) will not be disclosed to third Parties except persons associated with the participants in the process,
 - (2) are privileged and inadmissible for any purposes, and
 - (3) evidence that is otherwise admissible or discoverable is not rendered inadmissible or non-discoverable as a result of its use in the mediation process.
 - ii. This protection from disclosure may prevent the use of any evidence of Mediation in any future claims against the Parties or any retained attorney (*Cassel* warning).
- f. All confidentiality provisions shall extend beyond the duration of the Mediation.

- g. Family Law Provisions (If a Family Law Matter).
 - i. Mutual Fiduciary Responsibilities. Family Code Sec. 721 specifies that a husband and wife are in a fiduciary relationship that imposes a duty of the highest good faith and fair dealing on each of them and that prohibits either of them from taking any unfair advantage of the other. This duty includes the obligation to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets and debts.
 - ii. Disclosures. Family Code Sec. 2014-5 requires specific disclosures in the connection with the filing of a petition for dissolution. These disclosures while not produced for mediation, may be used during mediation. The requirement for such disclosures may only be waived as permitted by these statutes.
 - iii. Valuation.
 - (1) The Mediator will not be requested or required to investigate or confirm the identity or value of the Parties' assets or the identity and amount of their liabilities, or the amount of the Parties' income or expenses.
 - (2) The Parties reserve their rights to have any of these matters investigated or confirmed by an independent third party (for example: an attorney, accountant, appraiser, actuary, etc.)
- 4. This section shall not apply to any of the following:
 - a. Services rendered by a DRPA Agency.
 - b. Services rendered as part of an on-going relationship between the Parties and the Mediator (as may be typical of Family Law Matters) where the Mediator's services are of the same general kind as previously rendered to the Parties.
 - c. If the Parties are corporations, LLC's or other business entities.

Acknowledged:

Party	Date
Attorney	Date
Party	Date
Attorney	Date
Mediator	Date

161129b.Draft7.Proposed Standard Mediation Confidentiality Agreement.wpd

EMAIL FROM HOWARD J. FRANCO, JR. (8/14/17)

Re: Consideration of the California Law Revision Commission Report and Recommendations on Mediation Privilege

Dear Ms. Gaal:

My thanks to the California Law Revision Commission for its study of mediation. In my practice, Mediation has become an overriding imperative. I have practiced law for over 32 years and thought some of my practice insight may help. *These are my own, personal views, as a member of the bar:*

I started with an Orange County law firm in early 1985. Lawyers spoke about settlement with their counterparts directly. Courts held Mandatory Settlement Conferences usually the Friday before a Monday Trial. Many times, cases settled on the "Courthouse Steps." Our courts were congested. Cases were 5 years old. Down the street from the Orange County Court house, Judge Warren Knight and Judge Robert Banyard had just started a small office called Judicial Arbitration and Mediation Service (now JAMS). Their former colleagues still sitting on the Orange County Superior Court bench reached out for and received their help. Retired judges in this context were able to provide a valuable resource to the judicial system. The proceedings had confidentiality and resulted in numerous settlements.

Over time, litigation became larger, more complex and required more external support than the judicial system could then absorb. As the alternative dispute resolution business grew, it provided greater assistance to the bench. In addition to Mediation, Arbitration, Discovery Reference and Neutral Evaluation assisted the Court system by taking lengthy multi-party and complex litigation into a forum where the time and resources could be devoted that were necessary for cases to be resolved. Changes in the Code provided for greater use of alternative dispute resolution which reframed the process and allowed the Courts to focus on those cases which had to be tried.

Mediation has to be viewed in the overall context of alternative dispute resolution. It provides a valuable instrument for the Courts to get larger, more complex cases and those which need more time due to the perspectives of the litigants into a situation where it maximized resolution. Cases with multiple parties, complex facts and legal issues are more the norm than the exception. In the absence of Mediation, our Court system, already in distress over a lack of adequate funding, will face greater delays, attrition of qualified judges and court staff.

A Court cannot order Mediation. It can order a Mandatory Settlement Conference. Typically, a judicial officer other than the Trial judge will hear a Mandatory Settlement Conference. Unfortunately, since the caseloads of judges in civil courts average 1200-

1300 files, the opportunities to have a Mandatory Settlement Conference or a Voluntary Settlement Conference are typically far less than the earlier years when the Courts were funded properly, staffed with judges who had reasonable case loads and had adequate court staff. Even with volunteer Judges Pro Tempore, the Court system cannot meet the overwhelming demand for pre-trial settlement opportunities alone.

Confidentiality makes Mediation work. As Mediation cannot be ordered by a Court, it is by its very nature voluntary. As it is voluntary, its participants attend knowing that they have the protection of inadmissibility of what takes place there. A necessary component of that protection is that all the communications leading up to and at Mediation are privileged, confidential and cannot be used in a subsequent proceeding. It is the meeting of the minds to know that a third party neutral is needed and that everything said or written in lead up to and at Mediation is privileged that creates the greater likelihood that a compromise can be reached. Many disputes are driven by factors extrinsic to a case (e.g. personal animosity, business competition, familial dispute and the like). A skilled Mediator not only has to deal with the issues of the case, but the competing interests of the parties whose communication is often mixed with such perspectives. This takes time-often time that a sitting judge cannot provide in Court.

While I do not think the <u>Cassel</u> case compels any need to change the <u>Evidence Code</u> Section 1119 or related statutes, it does serve as a reminder that as a voluntary process, the client can choose to so authorize Mediation and attend or not. Perhaps at the heart of the concern about admissibility of the content of Mediation is a concern about the relationship of attorney to client, the explanation of Mediation and its resulting impact. I have not been a party to a Mediation which involved attorney misconduct and estimate I have probably attended approximately 200 or more of them in my career. In short, I don't think the very minor, if not remote risk of abuse warrants undermining the critical elements of what make Mediation work to begin with. A lawyer should be able to communicate with a Mediator about his client's views, whether his or her expectations are reasonable, whether the client needs to speak to opposing parties or not. In many respects, creating the closure and resolution a Mediation can provide may often be more difficult than trying the underlying case itself; however, in these times may be critical to our court system's survival.

Another component is the prevalence of insurance which has limits consumed by defense costs. Early, privileged Mediation, can access resources for case resolution which may not be available at the commencement of a Trial. Mediations are often used early in litigation now to conserve resources and leverage outcomes which could not have been reached in the absence of the confidentiality offered by Mediation. Mediators can focus on what the case will look like a year from now, how insurance has dissipated and also address coverage issues affecting same.

While I do not think any present change to the law is necessary, I offer an alternative which may be considered if the California Law Revision Commission strongly believes it must act in some way, perhaps to consider a different approach is to reinforce the voluntariness of the Mediation process. Most attorneys and Mediators have written

documents and disclosures, to be signed by counsel and their clients. Perhaps some language can be added in those agreements or create new ones and be required to be reviewed and signed by the clients at least 24 hours in advance of a Mediation as follows:

"Mediation is voluntary. It is private. The law has an exception for this privacy since Mediation has become successful where parties and their attorneys can communicate candidly amongst each other and the Mediator. The process is not for everyone and every case. It is a challenge for all participants. The facts and circumstances of a case may be difficult, embarrassing and uncomfortable. They may evoke emotion. Part of the process at a Mediation is to also think about whether you want and can withstand a public trial. No one can compel you to Mediate, accept anyone's recommendation for a potential resolution or force you to settle a case against your will. Period. It is your duty and obligation to advise your attorney and the Mediator if the process has reached the point where your continued participation is no longer voluntary. At that point, the Mediation stops and can only be resumed if you renew your consent to participate."

Thank you and the California Law Revision Commission for considering these comments.

Sincerely, Howard J. Franco, Jr. Attorney at Law Certified Legal Specialist in Legal Malpractice Law The State Bar of California Board of Legal Specialization

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F: 909-581-6101

July 17, 2017

Jerry Hill Member of the State Senate State Capitol #5035 Sacramento, CA 95814-4900

Re: California Law Revision Commission's draft legislation regarding mediation confidentiality

Dear Senator Hill:

While I am retired and am not currently an active member of the California Bar Association, I have participated for many years as a volunteer mediator in several of their mediation programs and continue to do so locally. I cannot imagine having the ability to conduct a successful mediation without having mediator confidentiality. If the California Law Revision Commission's draft legislation is passed, I will no longer volunteer for any mediation assignments and will not conduct any mediations. In my opinion, confidentiality is an essential component that makes mediation successful.

The essence of mediation is the premise of frank discussions. Without frank discussion, mediations would devolve into posturing, irrelevant positioning and greatly decrease the chance of success. I do not think the law regarding confidentiality needs to be changed but, if necessary, should be exceedingly narrow in scope and definitely limited to communications between a client and his or her own lawyer as described in the original Conference of California Bar Association 2011 proposal, Resolution 10-6-2011.

Thank you for considering my input.

Respectfully submitted,

/ S /

Lynne Higgs 1640 Carmelita Avenue Burlingame, CA 94010

July 17, 2017

Kevin Mullin Member of the State Assembly P.O. Box 942849 Sacramento, CA 94249-0022

Re: California Law Revision Commission's draft legislation regarding mediation confidentiality

Dear Assemblyman Mullin:

While I am retired and am not currently an active member of the California Bar Association, I have participated for many years as a volunteer mediator in several of their mediation programs and continue to do so locally. I cannot imagine having the ability to conduct a successful mediation without having mediator confidentiality. If the California Law Revision Commission's draft legislation is passed, I will no longer volunteer for any mediation assignments and will not conduct any mediations. In my opinion, confidentiality is an essential component that makes mediation successful.

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Thank you for considering my input.

Respectfully submitted,

/ S /

Lynne Higgs 1640 Carmelita Avenue Burlingame, CA 94010

EMAIL FROM RICHARD HUVER (8/16/17)

Re: Comments regarding proposed changes to mediation confidentiality

I am writing to comment on proposed Evidence Code section 1120.5, which will create new exceptions to California's mediation confidentiality statutes.

As a backdrop, I practiced plaintiffs' civil litigation for nearly 30 years and have been transitioning into full-time mediation since January 2016.

I appreciate the Committee's concerns that a client harmed by malpractice committed by his or her lawyer during a mediation could be left without a remedy because of the strict confidentiality statutes. I commend the Committee for all its hard work, meetings, revisions, hearings and more revisions, in crafting the final proposal.

Although extensive efforts were made to maintain a narrow scope of discoverable and admissible evidence, I am gravely concerned by the phrase "...relevant to prove or disprove..." alleged attorney malpractice (or fee billing disputes). Despite the rather narrow scope of the proposed exception, this phrase gives trial courts wide discretion to decide what is and what is not "relevant" to prove or disprove the pertinent issue. By requiring courts to make separate, subjective determinations of relevance, evidence and people outside the scope of the attorney client relationship — including adverse parties, their attorneys or others — could be unwittingly dragged into a legal malpractice lawsuit between the client and attorney. I am sure the Committee is not interested in burdening those outside the attorney client relationship with subpoenas for document production, deposition testimony or trial testimony, just to give the client the right to introduce evidence that what his or her attorney told them is allegedly below the standard of care.

There is an easy solution. In 2012, the Conference of California Bar Associations submitted a proposed new statute which included important limiting language: "The admissibility ... of communications directly between the client and his or her attorney..."

This important limiting language keeps the evidence as it should be — between the client and his or her attorney. After all, the only one who could be liable for legal malpractice would be the client's attorney and the only one with a claim would be the client. Therefore, the advice, communications, etc. directly between attorney and client is what would be relevant to prove or disprove the claims (and this would include fee or billing disputes as well). Yes, I understand there could be a situation where possibly someone tangential to the client or attorney might have evidence which might help prove or disprove the allegations. But I think shielding those documents, those communications and those people — who would necessarily be opposing parties participating in a mediation — and who are not part of the attorney client relationship from onerous discovery requests is a small price to pay. This would still allow the most relevant

evidence — communications directly between the client and his or her attorney — to be discovered and admissible.

Thank you for your consideration. I would be happy to discuss my thoughts with you in greater detail should it be helpful.

Richard A. Huver, Esq.



530 B Street, Suite 1700 San Diego, California 92101 Scheduling: 619.238.7282 Cell phone: 858.699.4288 Facsimile: 619.238.8041 www.huvermediation.com Solving problems and resolving conflict

September 7, 2017

California Law Revision Commission c/o UC Davis School of Law 400 Mrak Hall Drive Davis, California 95615

Re: Study K-402 Tentative Recommendation - Oppose Unless Amended

Dear Chairperson Lee, Commissioners, and Staff,

I support mediator Ron Kelly's communication of August 30, 2017, as follows:

I **oppose** the Tentative Recommendation as currently drafted for the reasons stated below. Instead, I support an amended Recommendation as follows, and for the reasons stated below:

- 1. Add three words to paragraph (a)(3) to read: The evidence does not constitute or disclose a writing <u>or oral communication</u> of the mediator relating to a mediation conducted by the mediator.
- 2. Add paragraph (a)(4) to read: (4) The communication or writing is a communication directly between a client and his or her attorney, only.

Reasons to Amend as Suggested Above.

A Mediator's Oral Communications Must Be Protected as Well. The intent of the current draft's (a)(3) is to allow mediators to be candid in creating their own notes and in their written communications to the participants, knowing they are not creating new evidence. The same logic applies to allowing mediators to be candid in their oral communications with the participants.

Attorney/Client Communications Only. The words "a communication directly between a client and his or her attorney, only" come directly from the Conference of California Bar Associations Resolution 10-06-2011 which initiated this Study. The Conference's logic was solid then, and still is. Attorney/client communications are created on behalf of the client. They should be admissible at the client's discretion. The resolution directly follows the finding in the Court of Appeal's decision in the Cassel case. This cited the existing exception in Evidence Code section 1122(a)(2) for a communication created on behalf of the client when the client agrees to disclosure.

Reasons for Opposition to the Tentative Recommendation as Currently Drafted.

- 1. No Evidence This Change Is Needed. A basic threshold question asked of everyone submitting a bill to the Senate Judiciary Committee is as follows: "Please summarize any studies, reports, statistics, or other evidence showing that the problem exists and that the bill will address the problem." For many years the Law Revision Commission staff and many of the rest of us have all searched diligently for reliable evidence that lawyer malpractice in mediation happens frequently enough to justify weakening our current protections in all mediations. No reliable study, report, statistics, or similar evidence justifying this change has been found. Since the enactment of Evidence Code Section 1152.5 in 1985 (later expanded into the current section 1119), disputants in California have had the right to choose either confidential mediation or non-confidential mediation. Before policy-makers take away this effective and well-tested right, they should require clear reliable evidence of a need for this change, and evidence that it will actually make things better, not worse.
- 2. Mediations Vary Widely, Some Kinds Severely Impacted. Right to Choose. Some commercial mediators say no one ever tells them the truth anyway. The kind of mediations they conduct probably won't be affected much. But many of us conduct a different kind of mediation. These often involve family members, friends, coworkers, business partners, neighbors, and others with past personal or business relationships. As mediators, we have been able to help disputants reach better agreements, and reduce the damage people do to each other and their families and coworkers, because they have been able to entrust us with sensitive confidential information. Anyone who has wanted to conduct a nonconfidential mediation has always been able to do so with a single one sentence agreement signed by the participants. The right to choose confidential mediation requires the support of a statutory scheme like our current sections 1115-1128, without exceptions that will subvert their predictability.
- 3. Groups Of Judges, Lawyers, Mediation Users, and Mediators Have Opposed Because They Understand The Damage. Since this proposal to weaken current protections was first introduced in the Legislature in 2012 as AB 2025, hundreds of opposition statements have been submitted. These include opposition from organizations like the State of California's own State Mediation and Conciliation Service, California Judges Association, California Dispute Resolution Council, Southern California Mediation Association, Association for Dispute Resolution of Northern California, Contra Costa and Marin County Bar Associations, and Community Boards of San Francisco, as well as individual mediators from all sectors of practice ranging from the immediate past president of JAMS to former family law bench officers. (All available in "Public Comments" memos at http://www.clrc.ca.gov/K402.html) For example:
 - a. The California Judges Association wrote in opposition explaining the adverse impact on their already unmanageable court caseloads. Sample quote: "...it is the California Judges Association position that there exist no valid reasons, including the very rare claim of malpractice by an attorney during the

mediation process, to justify an abrogation of the existing statutory confidentiality of the mediation process. It is simply too valuable to the civil court system in our state as a matter of public (and effective) policy to sacrifice that confidentiality."

(Exhibit 5 < http://www.clrc.ca.gov/pub/2016/MM16-19.pdf>)

b. Likely the largest single collection of mediation users in the state wrote in opposition - a united coalition of eleven major construction industry associations. These are the unionized builders of our public schools, hospitals, roads, and mass transit systems. They urged the Commission to adopt one of the many proposed alternatives that did not remove confidentiality protections. Sample quote: "Eliminating confidentiality would not only reduce the effectiveness of mediation as a tool, it would completely destroy it."

(Exhibit 1 http://www.clrc.ca.gov/pub/2016/MM16-50.pdf)

c. Even the State of California's own State Mediation and Conciliation Service, mediating since 1949, felt they had to take the unusual step of writing in opposition. Sample quote: "Were SMCS to lose the promise of absolute confidentiality...The result would be failed mediations and costly and disruptive labor disputes." (Exhibit 7 http://www.clrc.ca.gov/pub/2015/MM15-46s3.pdf)"

- 4. Misleading Focus on Lawsuits Alleging Malpractice, "Consumer Protection". Most people discussing this are focusing on later lawsuits alleging lawyer malpractice. But late in its discussions the Commission widened the scope well beyond malpractice lawsuits. The new exception will now remove current protections when a client alleges, whether in court or arbitration, that their lawyer violated the professional requirement that fees charged for their services in the mediation process be "reasonable". (See Bird v. Superior Court (2003) 106 Cal. App. 4th 419 - "Attorneys owe clients fiduciary duties that mandate fair, reasonable." and conscionable fees.") Suppose I'm the lawyer later accused of charging too much for services in a mediation context. My defense attorney will likely want to get details of the various positions taken, information shared, settlement proposals made and rejected, etc. to put together a defense based on the time the attorney needed to research and/or respond to all of these. The new exception will probably be used more often by defense attorneys to defend their lawyer clients from claims than by the client/consumers the proponents claim to be championing. Some judges, and especially some arbitrators, will later decide that "due process" will require that all mediation communications be discoverable and admissible to enable the accused attorney to defend themselves. See the position taken by a federal judge who decided that defendants accused of misconduct were later entitled to use the communications from a mediation even though all participants believed at the time their communications were confidential (Milhouse v. Traveler's (2014) - California Central District Case No. 08-CV-01739 - "Due process demanded that the Court allow the jury to hear the testimony regarding the parties' mediation statements.")
- **5. Unpredictable Protection, Chilling Effect on Mediation Candor.** When people come to understand that they can later be forced to turn over all previously confidential briefs and emails they might send to their mediator and they can even be forced to later repeat



under oath all statements made in mediation - if the other party simply later claims their lawyer charged unreasonable fees, then how forthcoming are they likely to be in the mediation in the first place? The main concern has never been that there will be lots of clients who are later unhappy - or their accused lawyers - who will subpoena everything. There might be. The main concern has always been that it won't take many of these being successful to make confidentiality unpredictable. As one former presiding judge pointed out, "Some judges will let nothing in. Some will let everything in. Some will end up in between. There's no way you'll know in advance."

6. More Exceptions Coming, Predictable Confidentiality Lost. This exception is just one of many that will be coming if the current Tentative Recommendation is enacted. See for instance the Conference of California Bar Association's 2015 resolution which aimed to remove confidentiality protections in divorce mediations (CCBA Resolution 09-03-2015 - opposed, withdrawn, acceptable compromise reached, compromise enacted this year as SB-217). There will be a dozen more exceptions proposed.

In one way or another, all forty million residents of our state have been affected by the millions of mediations we've conducted here. Our current right to choose confidential mediation was created thirty years ago for sound public policy reasons which remain valid today. Enacting any evidentiary exclusion involves tough public policy choices. There will always be an appeal to create a new exception for every scenario where our current protections might work an injustice. If we do, we will be destroying the widespread public benefits of predictable confidentiality in mediation.

As Commission staff pointed out in Staff Memorandum 2016-18: "The United States Supreme Court has warned that '[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'"

Respectfully submitted,

Michael Jonsson, Esq.

Professional Family Mediator

cc Hon. David W. Long, California Judges Association Ms. Heather Anderson, California Judicial Council

SACRAMENTO DIVORCE SOLUTIONS

EMAIL FROM ELIZABETH JONES (8/29/17)

Re: K-402 Mediation Confidentiality — OPPOSITION to CHANGES

Ms. Gaal,

I object to the proposed changes to Mediation Confidentiality.

The Current Evidence Code serves California well. Confidentiality it too important to change.

Yours truely

Elizabeth Jones, a Professional Corporation 369 San Miguel Drive, Suite 100 Newport Beach California 92660 714-973-7904 ejesq@me.com California Law Revision Commission c/o UC Davis School of Law, 400 Mrak Hall Drive Davis, California 95615

Re: Study K-402 Tentative Recommendation - Oppose Unless Amended

Summary: Our current right to choose confidential mediation will be eliminated. Participants will need to be warned that "everything you say or write now may be used in court later." Informed participants will not risk being candid. Court caseloads will increase because mediation will be less effective. The damage can be reduced by adding just the twenty words below.

Dear Chairperson Lee, Commissioners, and Staff,

I must regretfully oppose the Tentative Recommendation as currently drafted for the reasons stated below. I would instead organize <u>support</u> if the Recommendation is <u>amended</u> as follows for the reasons stated below:

- 1. Add three words to paragraph (a)(3) to read: The evidence does not constitute or disclose a writing or oral communication of the mediator relating to a mediation conducted by the mediator.
- 2. Add paragraph (a)(4) to read: (4) The communication or writing is a communication directly between a client and his or her attorney, only.

A. Reasons to Amend as Suggested Above.

- **1. Mediator's Oral Communications.** The intent of the current draft's (a)(3) is to allow mediators to be candid in creating their own notes and in their <u>written</u> communications to the participants, knowing they are not creating new evidence. The same logic applies to allowing mediators to be candid in their <u>oral</u> communications with the participants.
- 2. Attorney/Client Communications Only. The words "a communication directly between a client and his or her attorney, only" come directly from the Conference of California Bar Associations Resolution 10-06-2011 which initiated this Study. The Conference's logic was solid then, and still is. Attorney/client communications are created on behalf of the client. They should be admissible at the client's discretion. The resolution directly follows the finding in the Court of Appeal's decision in the Cassel case. This cited the existing exception in Evidence Code section 1122(a)(2) for a communication created on behalf of the client when the client agrees to disclosure.

B. Reasons for Opposition to the Tentative Recommendation as Currently Drafted.

- 1. No Evidence This Change Is Needed. A basic threshold question asked of everyone submitting a bill to the Senate Judiciary Committee is as follows: "Please summarize any studies, reports, statistics, or other evidence showing that the problem exists and that the bill will address the problem." For many years the Law Revision Commission staff and many of the rest of us have all searched diligently for reliable evidence that lawyer malpractice in mediation happens frequently enough to justify weakening our current protections in all mediations. No reliable study, report, statistics, or similar evidence justifying this change has been found. Since the enactment of Evidence Code Section 1152.5 in 1985 (later expanded into the current section 1119), disputants in California have had the right to choose either confidential mediation or nonconfidential mediation. Before policy-makers take away this effective and well-tested right, they should require clear reliable evidence of a need for this change, and evidence that it will actually make things better, not worse.
- 2. Mediations Vary Widely, Some Kinds Severely Impacted. Right to Choose. Some commercial mediators say no one ever tells them the truth anyway. The kind of mediations they conduct probably won't be affected much. But many of us conduct a different kind of mediation.

These often involve family members, friends, coworkers, business partners, neighbors, and others with past personal or business relationships. As mediators, we have been able to help disputants reach better agreements, and reduce the damage people do to each other and their families and coworkers, because they have been able to entrust us with sensitive confidential information. Anyone who has wanted to conduct a nonconfidential mediation has always been able to do so with a single one sentence agreement signed by the participants. The right to choose confidential mediation requires the support of a statutory scheme like our current sections 1115-1128, without exceptions that will subvert their predictability.

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 - a. The California Judges Association wrote in opposition explaining the adverse impact on their <u>already unmanageable court caseloads</u>. Sample quote:
 - "...it is the California Judges Association position that there exist no valid reasons, including the very rare claim of malpractice by an attorney during the mediation process, to justify an abrogation of the existing statutory confidentiality of the mediation process. It is simply too valuable to the civil court system in our state as a matter of public (and effective) policy to sacrifice that confidentiality."

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b. Likely the <u>largest single collection of mediation users</u> in the state wrote in opposition - a united coalition of eleven major construction industry associations. These are the unionized builders of our public schools, hospitals, roads, and mass transit systems. They urged the Commission to adopt one of the many proposed alternatives that did not remove confidentiality protections. Sample quote:

"Eliminating confidentiality would not only reduce the effectiveness of mediation as a tool, it would completely destroy it."

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Suppose I'm the lawyer later accused of charging too much for services in a mediation context. My <u>defense</u> attorney will likely want to get details of the various positions taken, information shared, settlement proposals made and rejected, etc. to put together a defense based on the time the attorney needed to research and/or respond to all of these. The new exception will probably be used more often by <u>defense</u> attorneys to defend their <u>lawyer</u> clients from claims than by the <u>client/consumers</u> the proponents claim to be championing.

<u>Some judges</u>, and especially <u>some arbitrators</u>, will later decide that "due process" will require that all mediation communications be discoverable and admissible to enable the accused attorney to defend themselves. See the position taken by a federal judge who decided that <u>defendants</u> accused of misconduct were later entitled to use the communications from a mediation even though all participants believed at the time their communications were confidential (Milhouse v. Traveler's (2014) - California Central District Case No. 08-CV-01739 - "Due process demanded that the Court allow the jury to hear the testimony regarding the parties' mediation statements.")

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6. More Exceptions Coming, Predictable Confidentiality Lost. This exception is just one of many that will be coming if the current Tentative Recommendation is enacted. See for instance the Conference of California Bar Association's 2015 resolution which aimed to remove confidentiality protections in divorce mediations (CCBA Resolution 09-03-2015 - opposed, withdrawn, acceptable compromise reached, compromise enacted this year as SB-217). There will be a dozen more exceptions proposed.

In one way or another, all forty million residents of our state have been affected by the millions of mediations we've conducted here. Our current right to choose confidential mediation was created thirty years ago for sound public policy reasons which remain valid today. Enacting any evidentiary exclusion involves tough public policy choices. There will always be an appeal to create a new exception for every scenario where our current protections might work an injustice. If we do, we will be destroying the widespread public benefits of predictable confidentiality in mediation.

As Commission staff pointed out in Staff Memorandum 2016-18: "The United States Supreme Court has warned that '[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'"

cc Hon. David W. Long, California Judges Association Ms. Heather Anderson, California Judicial Council

Respectfully submitted, Ron Kelly 2731 Webster St. Berkeley, CA 94705 ronkelly@ronkelly.com

EMAIL FROM NEIL J. MORAN (6/29/17)

Re: Proposed Weakening of Mediation Confidentiality — a shotgun to kill a fly.

Honorable Commissioners:

I write to urge the CLRC <u>not</u> to dilute the absolute confidentiality of mediation communications. The proposed change is well-intentioned, but misguided. Don't tear the fabric of mediation confidentiality. The proposed legislation represents a giant solution in search of an actual problem.

What qualifications do I have to opine? I've been in the dirt and mud trenches for 37 years. My entire life is <u>retail</u> law practice, not theoretical or academic law.

- I was admitted in 1980, and have 37 years' experience litigating and mediating civil lawsuits in California state courts, mostly in Marin County. I've represented clients at hundreds of mediations, and I have served as mediator for hundreds of participants.
- I have served as president of my county's bar association, chairman of my local school board, president of my local business improvement district.
- I've served as re-election campaign treasurer for five trial court judges.
- My wife is a retired trial judge. One daughter is a lawyer, and the second daughter 2/3 way through law school.
- I teach trial practice to lawyers and law students.
- I've handled scores of trust/will contests in which one crazy adult sibling creates misery for all. Don't give these miscreants another tool to torture others.
- I testify as an expert in lawyer standard of care and legal fee lawsuits.

I doubt most commissioners have the "retail" experience that long practicing lawyers have. You have the satellite view, but don't experience what local practitioners experience on the ground. Commissioners hear tales of woe by those afflicted with personality disorders and assume their sad claims are legitimate. The unpleasant reality is that these blamers have distorted views of reality.

• The need for such a major change has not been demonstrated. Settle and sue claims are infrequent. I've never had a client complain about my advice in a mediation. And I have received very few calls from prospective clients who wants to sue their lawyers for conduct in a mediation.

- Settle and sue plaintiffs do not deserve special treatment. I have received some calls from parties who suffer from seller's remorse. In my experience, such "settle and sue" plaintiffs are habitual "blamers," individuals who cannot or will not take personal responsibility for their decisions to settle lawsuits in mediation. "I deserved more." Or "I should not have paid so much money to settle a lawsuit against me."
- Persons suffering from personality disorders (sociopaths, narcissists, borderlines and histrionic personalities) are "frequent filers" in our civil justice system. They are sick people who habitually blame former spouses, former business associates, medical care providers, teachers, public safety employees, judges, lawyers and mediators. One common characteristic of those with personality disorders is their ability to garner support from well-intentioned persons you Commissioners. The Commission is unintentionally enabling these crazies.
- The proposed destruction of mediation confidentiality will create a new class of lawsuits, a burden on our already-overtaxed courts.
- Moreover, the unintended consequences to others (the lawyer who is <u>not</u> being sued) outweigh the potential benefit of the proposal to weaken the confidentiality rules. My time is objectively valuable: \$450 an hour at my current rates. When I have represented an <u>adverse party</u> in a mediation, who is going to compensate me for my time when my deposition is taken by the settle and sue plaintiff? It is not fair that I get dragged into someone else's post-mediation lawsuit with his or her lawyer and lose income.
- The proposed change will inhibit candor in mediation, as the lawyers must be concerned about having to give depositions when subpoenaed by a settle and sue plaintiff.

Sincerely,

Neil Jerome Moran SBN 96597

Neil J. Moran The Freitas Law Firm, LLP Westamerica Building 1108 Fifth Avenue, 3d Floor San Rafael, CA 94901 direct number: 415-456-7503 STANFORD RYAN
& ASSOCIATES, APC

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August 4, 2017

California Law Review Commission 4000 Middlefield Rd Room D-2 Palo Alto, CA 94303-4739 Sent Via Email to BGAAL@clrc.ca.gov

RE: Request for Public Comment regarding Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct

Dear Commissioners:

Thank you kindly for allowing us the opportunity to comment on this matter. Dan Stanford and I focus almost exclusively on bringing malpractice claims against negligent lawyers and law firms on behalf of bereaved legal consumers throughout California. Our firm's entire practice involves legal malpractice, breach of fiduciary duty, and representing clients who are in fee disputes against their former lawyers. We have some particular insight based upon experience on the issue at hand.

Lawyers sometimes hide behind the CEC §1119 mediation privilege and the effect prevents the client from producing critical evidence in support of their claims. Such misconduct includes:

1. Strong arming settlement by threats of withdrawing often just before trial or some critical aspect of the case such as expert designation or expert deposition.

- 2. Telling the client incorrect or exaggerated legal advice to obtain settlement authority.
- 3. Sometimes, a mediator or lawyer will tell a client during the mediation that the client's prior lawyer committed legal malpractice and for that reason, the case being mediated must be settled rather than tried. This type of evidence is critical to the statute of limitations in a legal malpractice case. It is also critical to proving that but for the legal malpractice, the result could have been better. It is also critical to rebuke the "settle and sue" defense often raised by negligent lawyers under Filbin v.

 Fitzgerald (2012) 211 Cal.App. 4th 154 and its progeny.

We believe overall that your intentions of creating this law do not necessarily match with what the outcome will be. The proposed mediation carve out exception will just raise another potential defense for negligent lawyers rather than assist victimized clients as written. Specifically, claims for fraud and breach of fiduciary duty should be included in

We suggest the following amendment to Proposed Evidence Code § 1120.5(a)(2)(B) should include claims for breaches of fiduciary duty and fraud against the lawyer.

We also believe that the phrase "professional requirement" creates a heightened standard that is too narrow and is new law that will not be supported by California case law for guidance as to its meaning.

In section (a)(1) we recommend that the code read "...relevant to prove or disprove an allegation that a lawyer breached a **professional duty**..." This would be consistent with CACI instructions, and would naturally include the California Rules of Professional Conduct, Business and Professions Code and years of precedent in CA

involving the standard of care. Creating a new heightened category by forcing parties to litigate what a "professional requirement" will simply be yet another point of contention in legal malpractice cases. If the goal of the committee is to protect consumers, the scope fo the lawyers' duties should not be artificially narrowed by the term "professional requirement". This begs the question: What is a lawyer **required** to do? Not much more than comply with the Business and Professions Code. The California Rules of Professional Conduct are not statutes. They are merely guidelines. They do not establish requirements. For example CRPC 3-510 provides that a lawyer shall promptly convey the terms and conditions of a settlement offer to a client. But since CRPC is not a statute, it could be argued that it is not a requirement of a lawyer's duties. In fact lawyers are not "required" to do very much as a matter of statute. Therefore, it makes much more sense to use "professional duty."

In essence, by using "professional requirement" rather than "professional duty" the proposed law will protect lawyers far more often than clients. By trying to parse out a lawyer's required and non-required professional duties, it just causes another area of contention for lawyers being sued who already enjoy very favorable statute of limitations laws, laws that do not require lawyers to carry errors and omissions insurance, case law regarding speculative damages, settle and sue cases, and a lawyer's ability to apportion fault to subsequent lawyers without actually suing them or even worse to their own clients who are laypersons (which medical doctors are prevented from doing in medical malpractice cases).

This terminology of a "professional requirement" is always going to leave room for argument about whether the particular advice or conduct was a "professional

requirement". For example, lawyers sometimes tell a client to accept a settlement or they will quit. It would then be argued in every case that the lawyer was not "professionally required" to continue to represent the settling client and that the continuance of the attorney client relationship was not legal advice. The proposed language makes the rule very narrow and favors the lawyer heavily in that regard because the lawyer will always be able to argue the advice to the client was professionally required but the client asserting malpractice will not be able to easily make that argument unless there is some precedent out there regarding the definition of a lawyers' professional "duties" which has been addressed by a body of case law versus "professional requirements" which is an invented and heightened standard of care.

Finally, oftentimes lawyers engage in puffery in mediation briefs and expect them to remain confidential. This is one of the reasons why CEC§1152 prevents settlement communications from entering into evidence. The proposed law seems to open the floodgates for mediation briefs to be admissible evidence in malpractice cases which will almost always have an effect on causation and damages in the malpractice case. Imagine a jury in a malpractice case having to read and analyze mediation briefs in a personal injury case. Does the disclosure of one brief for the client's lawyer automatically require the disclosure of the other mediation brief? Is this going to effect the efficacy of mediators?

To date, we have never come across a situation where we were unable to prove our case because of the assertion of the mediation privilege. If it is an important enough issue, both parties could waive the privilege, or a judge could rule on it on a case by case basis rather than carving out a statutory exclusion. We see little for clients to gain by amending the current mediation law. Instead, we foresee this law favoring defense lawyers and negligent lawyers being sued by clients far more often and would discourage the proposed amendment.

If you want to change the laws in a way that help legal consumers you should focus on CCP§340.6 which is in desperate need of attention. The exceptions to the rule have swallowed the rule. The case law has created the "constructive knowledge" exception or the "discovery rule". The result is that grossly negligent lawyers, and their carriers are allowed to squirm out of liability based on when the client "should have known" of the lawyer's malpractice by conducting a "reasonable investigation" after suspecting that the lawyer committed malpractice. Further, this knowledge may be imputed to the client from their subsequent lawyer. This exception is so ambiguous, it allows the negligent lawyers an opportunity to create a statute of limitations argument at trial and file MSJs in almost every single legal malpractice claim. The CCP §340.6 should be changed back to a clearly written two year statute of limitations on legal malpractice claims based upon the actual discovery of the lawyer's malpractice. Further, errors and omissions insurance should be mandatory for lawyers. If there were more policies sold, the rates would go down and clients would be protected from lawyers who intentionally stop carrying insurance after they get sued and move their assets to shell entities which prevents most plaintiff's malpractice lawyers from pursuing claims against uninsured lawyers. This generally hurts the lower economic class of clients because they can only afford sole practitioners who often do not have insurance, are new lawyers or are otherwise judgment proof. This is especially something to consider now that CalBar

is making the Bar exam easier by eliminating the performance aspect of the exam and lowering the passing score threshold.

Kind Regards,

STANFORD, RYAN & ASSOCIATES, APC

Raymond Y. Ryan

EMAIL FROM ELIZABETH STRICKLAND (8/31/17)

Re: California Law Revision Commission Study of Mediation Confidentiality and Attorney Misconduct

Ms. Gaal -

Thank you for giving me an opportunity to comment on proposed Evidence Code section 1120.5. I have enjoyed reviewing the work that the Commission devoted to this concern.

I have attached my comments as a document as well as including them in the text of my email.

Thank you again -

Elizabeth Strickland

[Comments omitted here; displayed in attachment instead.]

Elizabeth A. W. Strickland, Esq. Attorney-Mediator, Civil Division Superior Court, Santa Clara County 191 N. 1st Street, San Jose, CA 95113 Ph 408-882-2530 Fx 408-882-2595 estrickland@scscourt.org

THE POTENTIAL EFFECTS OF PROPOSED EVIDENCE CODE SECTION 1120.5

Fundamental reasons to withdraw this proposed exception to mediation confidentiality:

- 1. This section will not be applied uniformly, which will lead to mistrust of mediation.
- 2. The risk to opposing parties and counsel outweighs the presumed benefit.
- 3. Trial rates will increase when mediation inevitably decreases.
- 4. This limited problem doesn't justify the outsize solution.
- 5. This section will be abused by unscrupulous counsel.
- 6. There is a way to hold attorneys accountable without this amendment.
- 1. Lack of uniform application of the exception

1120.5 (a) (1) and 1120.5 (b) (3): The proposed amendment appears to be based on a belief that every judge in the state is equally supportive of mediation. But this is not the case. Our bench officers in this state have a spectrum of experience regarding the mediation process, as well as a breadth of judicial opinion on the utility of mediation in a litigated case.

There is also no universal agreement on whether mediation confidentiality should be protected, as witnessed by the differences in rulings in past attempts by counsel to break confidentiality in order to access otherwise unobtainable information. Fortunately, as those rulings have been appealed, confidentiality has been protected. But the difference in the initial outcomes is important to note.

As a result of the variance in judicial viewpoints, the proposed amendment has the potential to create a variety of rulings when the approximately 2000 judges across California (per the Tentative Recommendation, page 105) are faced with the questions of relevance and necessity. This will lead to confusion and distrust regarding the reliability of mediation confidentiality.

2. Risks to opposing parties and counsel

1120.5 (c) and (d): The CLRC's comments on these sections (Tentative Recommendation, page 139) state that a court could use judicial tools to limit exposure. That does not mean that every court will use one, or any, of these tools. Hence there is no assurance that disclosure will be limited. As such, this proposal is dangerous to opposing parties and counsel who should not have to bear that risk because of someone else's attorney-client dispute.

Notifying opposing parties and counsel about a possible disclosure is not the same thing as protecting opposing parties and counsel from unjustified disclosure. If any party seeks disclosure of confidential mediation communications, it requires uninvolved parties to become involved parties, potentially at significant expense to themselves, to defend against unwarranted disclosures. And that will in turn prolong the litigation process for more people, bringing opposing parties and counsel into the fray.

The inherent uncertainty in this proposal may result in either unpredictable protection or no protection at all. It harms public confidence in the legal system when the system allows opposing

litigants and counsel to be put at such risk, especially after the risk should have been eliminated by reaching a mediated agreement.

A malpractice dispute is between the client and her/his attorney. It should stay between the client and her/his attorney.

3. Risks to both private and court-connected mediation

If the mediation process falls into disrepute, and parties lose confidence in their ability to fully engage in safe negotiation, people won't use mediation anymore. And when that happens, trial rates will increase. That is NOT to suggest that courts' needs outrank litigants' needs; but it does mean that every litigant will bear an increased burden for the anticipated decrease in proactive, early, mutually agreeable settlements.

In addition, if the mediation process falls into disrepute, mediators will leave the practice. Many have already expressed their intention to do so. This isn't because they want to protect an attorney who is guilty of malpractice. But they will not put themselves at risk of being wrongfully subpoenaed to disclose what should be kept confidential, as well as spending their time and money defending against such wrongful subpoenas.

Draining the mediation market of the skilled practitioners that have taken decades to hone their abilities is misguided. It is especially so when it doesn't solve the underlying problem. It is a bad outcome for parties, for counsel, for courts, and for the public.

When parties and counsel begin to see their mediation communications disclosed, even if redacted or sealed or disclosed only in camera, mediation <u>will</u> fall into disrepute. The whole point of mediation is full and safe disclosure of necessary evidence as a way to expedient resolution. Putting confidentiality into question effectively guts the process.

4. The exception is unnecessary

This is a solution in search of a problem. Of the hundreds of thousands of cases mediated in this state, the CLRC cites a small number of cases as the examples of the reason for this proposal. The Tentative Recommendation also recognizes that there is very little hard evidence to suggest that this is anything other than a rare occurrence. And although it is understood that there may have been malpractice cases that were never pursued due to the strength of mediation confidentiality ("we don't know what we don't know"), the fact that so few have been attempted and that they have not been successful should be a strong guide to the Commission.

Undermining the public's confidence in mediation and mediation settlements isn't the right solution to a limited problem. Creating this kind of confusion, and removing what is now a powerful and viable settlement tool, is both imprudent and heedless of the consequences to the litigating public.

5. Abuse of the proposed exception is likely

The harm will significantly outweigh the good.

The restrictions in this proposed amendment are directed at skilled attorneys. Of course attempts will be made to use this code section to undo settlements, the text of the proposal notwithstanding.

Overly-aggressive advocates may well be said to operate in the spirit of Michael Jordan's dictum; "You miss every shot you don't take."

1120.5 (a) (3): Mediation is already mishandled by some counsel as a way to get "free discovery". There is no reason to think that expanding the number of ways to reach otherwise confidential material is going to discourage them. On the contrary, it is an invitation to use this proposed exception to dig further.

Even in the past, with confidentiality being well protected, there have been egregious attempts to undermine mediation settlements. This proposed exception will encourage people to prolong the fight, rather than protect settlements reached in good faith. It is shortsighted to think otherwise.

6. Providing meaningful support for a malpractice claim

It would be a more effective malpractice disincentive to put the responsibility for malpractice squarely where it belongs; on counsel. Instead of invading confidential mediation communications, the legislature should require every attorney to review the existing benefits and restrictions of confidentiality with her/his client before commencing a mediation. Counsel should be mandated to provide every client with a written explanation of mediation confidentiality, including foreseeable positive and negative consequences, to review that document in person with the client, and to sign the document alongside the client.

If an attorney fails to review this disclosure document with the client in person, and fails to sign this document alongside the client, and cannot produce this document when a malpractice claim arises, then the attorney faces the prospect of being held to have admitted to malpractice.

Such a requirement would leave mediation confidentiality intact, and would put the burden on the attorney, not the client or the other parties and counsel, to protect his/her clients and him/herself.

No one is advocating that malpractice be protected. No one wants wrongdoers to escape the consequences of their choices. But equally importantly, no one wants to sacrifice large numbers of mutually agreed settlements and open up all the litigation involved as a way to hunt down the small number of bad actors.

Make counsel responsible for warning their clients. Make counsel pay the price if they don't. Leave mediation settlements and other parties out of the problem.

EMAIL FROM JILL SWITZER (8/24/17)

Re: Proposed Evidence Code Section 1120.5

I write to the Commission in my personal capacity as an attorney mediator and not as a representative of ARC or any other entity.

I have reviewed proposed Evidence Code section 1120.5 and I have some questions and concerns:

- 1. The comment to the proposed legislation states that "...the exception does not apply in resolving a claim relating to enforcement of a mediated settlement agreement." What happens if a party moves for enforcement of the settlement agreement pursuant to Code of Civil Procedure section 664.6 and the defendant files a cross-complaint for malpractice arising out of something that occurred at the mediation, e.g. a breach of the attorney's professional duties in the mediation context? Would that cross-complaint be barred? Could the defendant file a separate action for malpractice?
- 2. I think the Commission should make it clear that that "...the exception does not apply in resolving a claim relating to enforcement of a mediated settlement agreement, such as a claim for rescission of such an agreement or a suit for specific performance" by including that language in the proposed legislation, not merely in the comment.
- 3. Subsection (d) requires that notice of the complaint or cross-complaint be "served" on all mediation participants. The comment talks of "providing notice" to mediation participants. Notice and service are two different concepts. I would suggest that "notice" to mediation participants be substituted for "service." "Service" implies that a responsive pleading must be filed by all mediation participants, thus embroiling participants who otherwise would not and should not be involved.
- 4. Whose obligation will it be to advise mediation participants that confidentiality is not guaranteed? Will it be the mediator who must advise the participants that mediation confidentiality will not exist among the participants should one party or another sue their lawyer for malpractice? Will that be the responsibility of parties' counsel? At what point should that advisement be given? In advance of the mediation date?
- 5. In response to the Commission's request for input on the content and wording of paragraph (a)(3), I would suggest a slight addition (in italics) as follows: "The evidence does not constitute or disclose a writing, as defined in Evidence Code section 250, of the mediator relating to a mediation conducted by the mediator."

While I well understand that the Commission is trying to balance the equities, so to speak, between lawyer and client, I think that adding this exception will result in a situation of "be careful what you wish for." I think there will be a rise in legal

malpractice claims based on attorney mediation conduct and a reduction in cases mediated.

Although at the end of the day there may be no more settlements and/or verdicts for legal malpractice than there are today, I think the disruption to the sanctity of mediation confidentiality cannot be overstated.

Thank you for the opportunity to comment.

Jill Switzer, Esq. P.O. Box 91476 Pasadena, CA 91109

Cell: 626-354-2650; Fax: 626-478-1465

jillswitzer@sbcglobal.net

Michael Trust 28401 Los Alisos Boulevard, #7209 Mission Viejo, CA 92692 Mictru1@outlook.com

July 23, 2017

Ms. Pat Bates Senator, CA 36th State Capitol Room 305 Sacramento, CA 95814

RE: Law Revision Commission Study K-402

Dear Ms. Bates:

I reside in your District.

I oppose any change to the confidentiality of mediation in California, and thus oppose the implementation into law of Study K-402.

Thank you.

Sincerely,

Michael R. Trust, MPA, SPHR, PHR-ca, SHRM-SCP, CA Certified Mediator

Michael Trust 28401 Los Alisos Boulevard, #7209 Mission Viejo, CA 92692 Mictru1@outlook.com

July 23, 2017

Mr. Bill Brough Assemblymember, CA 73rd State Capitol Suite #3141 Sacramento, CA 94249

RE: Law Revision Commission Study K-402

Dear Mr. Brough:

I reside in your District.

I oppose any change to the confidentiality of mediation in California, and thus oppose the implementation into law of Study K-402.

Thank you.

Sincerely,

Michael R. Trust, MPA, SPHR, PHR-ca, SHRM-SCP, CA Certified Mediator

EMAIL FROM A. MARCO TURK (7/4/17)

Re: Opposition to K-402

Please see the attached. Thank you.

A. Marco Turk, J.D.
Professor and Director Emeritus
Negotiation, Conflict Resolution & Peacebuilding Program
California State University Dominguez Hills
amturk@csudh.edu

Adjunct Professor of Law Straus Institute for Dispute Resolution Pepperdine University School of Law marco.turk@pepperdine.edu [Tel. 310-309-0064]

A. Marco Turk, J.D.

Professor and Program Director Emeritus Negotiation, Conflict Resolution and Peacebuilding Program

1000 E. Victoria Street, Carson CA 90747 310-309-0064/amturk@csudh.edu

July 4, 2017

Hon. Ben Allen 2512 Artesia Blvd., #320 Redondo Beach, CA 90278-3279

Re: Mediation Confidentiality (LRC Study K-402)

Dear Senator Allen:

I am one of your constituents and have been involved in the alternative dispute resolution field since 1991, first as a lawyer and mediator, and later as an educator. Please allow me to provide my comments regarding the California Law Revision Commission's draft legislation regarding mediation confidentiality (Study K-402).

My experience is that process confidentiality is essential to effective and successful mediation. While I oppose any modification to mediation confidentiality, if an exception must be established I suggest the law should be narrowly tailored as depicted in the Conference of California Bar Association's original proposal, set forth in Resolution 10-6-2011. Specifically, to enact legislation that would make admissible mediation "communications directly between the client and his or her attorney only," <u>not</u> all mediation communications among other parties and the mediator.

If an exception must be made to address potential attorney malpractice in this confidential process (which I perceive to be the motivation behind the proposed legislation), this would be the best way in my opinion to address that issue while continuing to protect and foster frank discussions in mediation, an essential prerequisite to the settlement of disputes.

Thank you for the opportunity to provide my input in opposition to the pending bill that is designed to take away our right to choose a confidential mediation. I strenuously urge you to also oppose the proposed legislation.

Please let me know if you have any questions.

Wares Juk

Respectfully submitted,

A. Marco Turk

A. Marco Turk, J.D. Professor and Program Director Emeritus Negotiation, Conflict Resolution and Peacebuilding Program

1000 E. Victoria Street, Carson CA 90747 310-309-0064/amturk@csudh.edu

July 4, 2017

Hon. Richard Bloom 2800 28th Street, Suite 105 Santa Monica, CA 90405

Re: Mediation Confidentiality (LRC Study K-402)

Dear Assemblyman Bloom:

I am one of your constituents and have been involved in the alternative dispute resolution field since 1991, first as a lawyer and mediator, and later as an educator. Please allow me to provide my comments regarding the California Law Revision Commission's draft legislation regarding mediation confidentiality (Study K-402).

My experience is that process confidentiality is essential to effective and successful mediation. While I oppose any modification to mediation confidentiality, if an exception must be established I suggest the law should be narrowly tailored as depicted in the Conference of California Bar Association's original proposal, set forth in Resolution 10-6-2011. Specifically, to enact legislation that would make admissible mediation "communications directly between the client and his or her attorney only," <u>not</u> all mediation communications among other parties and the mediator.

If an exception must be made to address potential attorney malpractice in this confidential process (which I perceive to be the motivation behind the proposed legislation), this would be the best way in my opinion to address that issue while continuing to protect and foster frank discussions in mediation, an essential prerequisite to the settlement of disputes.

Thank you for the opportunity to provide my input in opposition to the pending bill that is designed to take away our right to choose a confidential mediation. I strenuously urge you to also oppose the proposed legislation.

Please let me know if you have any questions.

Wars Ink

Respectfully submitted,

A. Marco Turk

LAW OFFICE OF KIRK D. YAKE

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KIRKYAKELAW.COM

WRITER'S EMAIL ADDRESS: KIRK@KIRKYAKELAW.COM

September 1, 2017

SENT VIA EMAIL (bgaal@clrc.ca.gov)
Barbara Gaal
Chief Deputy Counsel
California Law Review Commission

Dear Ms. Gaal:

I am writing this letter regarding the Commission's draft recommendation on Study K-402 modifying California's current mediation confidentiality statutes to permit discovery of mediation communications when attorney malpractice is alleged. I oppose the Commission's recommendation on the grounds that it is unnecessarily overbroad, and that on balance, the scope of the Commission's recommended revision is excessive relative to the issue it seeks to address – correcting the instance where malpractice is shielded by the current mediation confidentiality statutes. I encourage the Commission to adopt the moderate approach advanced in Resolution 10-06-2011 of the Conference of California Bar Associations, and limit disclosure to those communications between the aggrieved party and his or her attorney when malpractice is alleged. This position would result in less upheaval to current mediation disclosure practices, and have less of an impact on parties' confidence that mediation in California remains the best and most affordable means of resolving disputes with a significant measure of finality and confidentiality.

From my experience in selling wary and gun-shy parties on the merits of mediation, the spectre of confidential communications suddenly being susceptible to production because the "other side" decides to sue his/her attorney creates a serious impediment to parties' willingness to try mediation. This same concern becomes all the more significant as the stakes go higher, and in high-dollar mediations with trade secrets or private family information involved, the parties are all the more likely to be squeamish about mediation. This would be a tremendous disservice to the legal system in California, as it is undisputed that mediation diverts a very significant caseload away from courts and into the hands of the parties, who are surprisingly adept at settling their own disputes when given the proper tools and setting.

In the ten years that I have mediated cases, a significant amount of my mediation work has been seeking to mediate cases where one or both sides are unrepresented parties. This has included pro bono work for the small claims division of San Diego Superior Court, and employment cases for the federal Equal Employment Opportunity Commission ("EEOC"). I have also mediated many cases where parties are represented. Confidentiality is a big selling point when encouraging parties to engage and to trust in the mediation process. Parties are

California Law Review Commission In c/o Barbara Gaal Page 2 of 2

oftentimes very reluctant to hand their case to a mediator, and even more distrustful of the other side. The Commission's proposed recommendation, should it become law, will in my opinion, be unnecessarily harmful to fostering trust in mediation, whereas, parties are much more likely to agree that in disputes between a party and his/her attorney, the communications between them can be made admissible. Accordingly, CCBA Resolution 10-06-2011 is a much more acceptable compromise and means of accomplishing the objectives of the study.

Sincerely,
LAW OFFICE OF KIRK D. YAKE
/-/ V:1 V1 -
/s/ Kirk Yake
Virla D. Valza



Justice Through Laws

Larry Doyle, Legislative Representative
Telephone: 916-761-8959
Facsimile: 916-583-7672
Email: Larry@LarryDoyleLaw.com

September 1, 2017

The Hon. Chair and Members California Law Revision Commission c/o UC Davis School of Law 400 Mrak Hall Drive Davis, CA 95616

Study K-402 – Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct Support for Tentative Recommendation

Dear Chair Lee and CLRC Members and Staff:

The Conference of California Bar Associations (CCBA), a statewide organization of attorneys representing more than 30 metropolitan, regional and specialty bar associations, strongly supports the <u>Tentative Recommendation</u> developed by the Commission regarding Study K-402 ("Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct").

The Tentative Recommendation is fully consistent with the objective and spirit of CCBA Resolution 10-06-2011 and the original AB 2025 of 2012, which was sponsored by the Conference. These proposals were the bases for the provision of ACR 98 of 2012 that directed the CLRC to study the dangers absolute confidentiality posed to mediation consumers who had been victimized by incompetent or unethical attorneys. Although Resolution 10-06-2011 proposed an exception to mediation confidentiality only for communications directly between attorney and client during the course of a mediation, its clear objective was the protection of clients from unethical and incompetent attorneys. The Tentative Recommendation is absolutely consistent with the CCBA's objective in that regard.

Early in the course of Study K-402, the CLRC considered a limited exception along the lines of that set forth in Resolution 10-06-2011, and found to be unworkable. Unlike Evidence Code §958,¹ the commission determined, such a limited exemption would be a

¹ 958. There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship.

one-way exception, permitting, as the majority noted in <u>Cassel v. Superior Court</u>, <u>51 Cal.</u> <u>4th 113</u>, "a client to support a malpractice claim with excerpts from private discussions with counsel concerning the mediation, while barring the attorneys from placing such discussions in context by citing communications within the mediation proceedings themselves." Thus, basic fairness requires a slightly expanded exemption such as that contained in the Tentative Recommendation. It is ironic that opponents of the Tentative Recommendation, whose vehement opposition to Resolution 10-06-2011 and AB 2025 in 2012 led to the current study, now point to the original version of Resolution 10-06-2011 as a reasonable alternative.

Similarly, the opponents of AB 2025 of 2012 – and now of the Tentative Recommendation – have asserted from the beginning of the process that any exception to absolute confidentiality will destroy mediation in California, because no one will mediate without it. Yet in four years of hearings by the CLRC, not a single mediation consumer has come forward to state that he or she would not participate in mediation absent absolute confidentiality,² in contrast to dozens of consumers (at least) who support the Commission's efforts to provide protection in those rare cases involving unscrupulous or incompetent lawyers, and several of which testified to that effect. This argument also flies in the face of the experience of essentially all other U.S. jurisdictions, none of which have confidentiality requirements as extreme and unrelenting as California's. The fact that mediation exists and thrives in these other states stands as solid proof that consumer protection and mediation can co-exist.

The Tentative Recommendation has been completely mischaracterized by opponents as an attack on "the right to choose confidential mediation." The current system does not give consumers a "right" to choose essentially absolute confidentiality, it robs unsuspecting consumers of their right to recourse against dishonest or incompetent attorneys when mediation is involved. If this right to recourse is to be taken away in the name of confidentiality, it only should be done so with the consumer's knowledge and informed consent. Removing the consumer's right to recourse should never be the default under statute, as it is under current law.

In summary, the Tentative Recommendation provides necessary protection to victims of attorney malpractice or malfeasance during a mediation, while still protecting the mediation process and the confidentiality of other participants from exposure except when absolutely necessary to promote justice.

Thank you again for your valuable efforts on this important issue. Please contact me at (916) 761-8959 or Larry@LarryDoyleLaw.com if I can be of assistance.

Larry Døyle

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² The commission was at one point presented with a letter signed by several lobbyists for California's building industry saying that they supported mediation confidentiality – but not threatening not to participate in mediation if change were made.

EMAIL FROM JOHN P. BLUMBERG (8/7/17)

Re: Mediation Confidentiality

This email concerns the issue of whether attorney-client communications relating to a mediation should be confidential and, therefore, inadmissible in a subsequent legal malpractice case. I am a certified specialist in legal malpractice law and also certified as a mediator with over 100 hours of formal mediation training and experience in hundreds of mediations. Until the case of <u>Cassell v. Superior Court</u>, 51 Cal.4th 113, no attorney truly believed that the advice they gave to a client regarding settlement in a mediation setting was any different from the settlement advice they gave in a non-mediation setting. In both settings, the attorney gives advice which is "confidential." The location of the advice — in a mediator's office building instead of the lawyer's office, is truly irrelevant. In <u>Cassell</u>, the Supreme Court reluctantly held that the exact wording of the statute applied to attorney-client communications pursuant to and during mediation. In a concurring opinion, Justice Chin said,

"The court holds today that private communications between an attorney and a client related to mediation remain confidential even in a lawsuit between the two. This holding will effectively shield an attorney's actions during mediation, including advising the client, from a malpractice action even if those actions are incompetent or even deceptive. Attorneys participating in mediation will not be held accountable for any incompetent or fraudulent actions during that mediation unless the actions are so extreme as to engender a criminal prosecution against the attorney. This is a high price to pay to preserve total confidentiality in the mediation process."

Justice Chin urged the legislature to remedy the problem. That remedy process has been a long time coming. In the interim, I have represented both attorneys being sued and clients who wanted to sue their lawyers. For the attorneys, the <u>Cassell</u> rule proved to be an absolute immunity, regardless of whether their mediation advice was fraudulent or negligent. For the clients, I have had to advise them that they had no recourse. Regardless of my ability to prevail on behalf of my lawyer-clients, and my own self-interest in being able to avoid being sued after a settlement achieved at mediation, I believe that the statute must be amended so that lawyers are held accountable when their advice is fraudulent or negligent. Some lawyers fear so-called "frivolous" claims against them. That is never a good reason to deprive clients of the right to justice. It is not as though an amendment would open the floodgates of litigation against lawyers. It is very, very difficult to prevail in a "settle and sue" case. See, for example, <u>Namikas v. Miller</u> (2014) 225 Cal.App.4th 1574, 1582–83:

"It is not enough for [the plaintiff] to simply claim ... that it was possible to obtain a better settlement or a better result at trial. The mere probability

that a certain event would have happened will not furnish the foundation for malpractice damages." . . . Damage to be subject to a proper award must be such as follows the fact complained of as a legal certainty. In other words, the plaintiff must show that "[he] would certainly have received more money [or had to pay less] in settlement or at trial." . . . The requirement that a plaintiff need prove damages to 'a legal certainty' is difficult to meet in any case. It is particularly so in 'settle and sue' cases...," which are inherently speculative. . . . T]he amount of a compromise is often 'an educated guess of the amount that can be recovered at trial and what the opponent was willing to pay or accept. Even skillful and experienced negotiators do not know whether they received the maximum settlement or paid out the minimum acceptable. Thus, the goal of a lawyer is to achieve a "reasonable" settlement, a concept that involves a wide spectrum of considerations and broad discretion."

I urge passage of legislation to remove the mediation confidentiality rule as it applies to an attorney's advice at or pursuant to mediation.

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Board Certified Trial Lawyer
(National Board of Trial Advocacy)
Board Certified Medical Malpractice Specialist
(American Board of Professional Liability Attorneys)
Board Certified Legal Malpractice Specialist
(State Bar of California, Board of Legal Specialization)
(American Board of Professional Liability Attorneys)

EMAIL FROM DAVID J. HABIB, JR. (6/28/17)

Re: Proposed New EC 1120.5

Dear sir or madam,

I support adoption of the proposed new Evidence Code section, excepting attorney-client communications in mediation from the confidentiality rule under limited, very specific, circumstances dealing with attorney misconduct.

David J. Habib, Jr. LAW OFFICE OF DAVID J. HABIB 2835 Townsgate Road, Suite 102 Westlake Village, CA 91361 USA

tel: 805.479.8813 fax: 805.379.0345 www.habiblaw.com

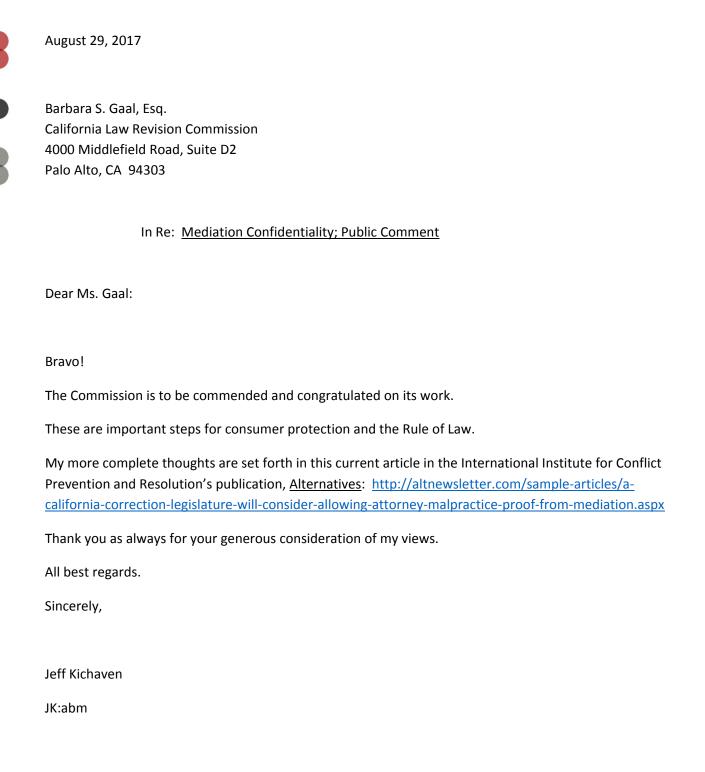
Vice Chair, District Export Council of So. California By Appointment of the U.S. Secretary of Commerce

Please see my Linked In profile:

https://www.linkedin.com/profile/view?id=AAIAAABrql0BrLNCeHyJrYrwA-QHZTguBXJE-aI&trk=nav_responsive_tab_profile



JEFF KICHAVEN COMMERCIAL MEDIATION



Alternatives To the High cost of Litigation

The Newsletter of the International Institute for Conflict Prevention & Resolution

VOL. 35 NO. 7 JULY/AUGUST 2017

Commentary

A California Correction? Legislature Will Consider Allowing Attorney Malpractice Proof from Mediation

BY JEFF KICHAVEN

he evidence is in. After 43 years of federal practice under Rule 408 of the Federal Rules of Evidence (1975); 19 years of New York practice under CPLR 4547 (1998); and 16 years of practice in various states under the Uniform Mediation Act (2001), we can conclude: Statutory confidentiality is not necessary for effective mediation.

The UMA provides limited confidentiality for mediation; FRE 408 and CPLR

4547 provide almost none. In jurisdictions governed by them all, there is no evidence of adverse effects on the use or effectiveness of mediation.

California remains the big outlier, and its stance has had a significant impact on proving a case of attorney malpractice. The state's so-called "absolute confidentiality" rules (Cal. Ev. C. 1115, et seq.) stymie consumer protection and spit in the eye of the Rule of Law. All for no good reason.

There is no evidence that this regime is necessary for mediation to be effective. Fortunately, the California Law Revision Commission in June recommended that the legislature change this.

Such a move—which has been in the works since the California Legislature tasked the commission with studying whether a change was needed in 2013 (see "How California Intends to Recalibrate the Concept

The author is an independent mediator based in Los Angeles with a national practice. He focuses on insurance, intellectual property and professional liability matters. He is a member of Alternatives' editorial board. This article is based on two predecessors by the author, as well as his submissions to the California Law Revision Commission. It has been updated and expanded from those articles and submissions, which include "Calif. Nearer To Needed Mediation Reform," Low360 (April 10, 2017)(available at http://bit.ly/2qzWttl), and "Mediation, Confidentiality and Anarchy: The California Nightmare," Doily Journal (Los Angeles) at p. 4 (Feb. 17, 2011).

of Mediation Confidentiality," 35 Alternatives 93 (June 2017)(available at http://bit.ly/2sWyqr1))—would be an adjustment in the right direction. Here's why:

CURRENT LAW

The heart of California's so-called absolute confidentiality rule is Evidence Code Section 1119, which provides:

"Except as otherwise provided in this chapter:

- "(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
- "(b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication,

(continued on page 103)

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civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

"(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential."

This causes problems. In particular, if a consumer feels that her lawyer committed malpractice against her in a mediation, she cannot have her claim heard on the merits.

All of the evidence, oral and written, in support of her claim was "made for the purpose of, in the course of, or pursuant to, a mediation" within the meaning of Evidence Code Section 1119, and is therefore inadmissible.

And without admissible evidence to support her claim, no matter how righteous that claim might be, it will be dismissed without a court ever considering its merits.

Michael Cassel's search for justice in the face of this statute reached the California Supreme Court in Cassel v. Superior Court, 51 Cal.4th 113 (2011)(available at http://stanford.io/2eodN2N). Here's the court's summary of what he tried to prove in a malpractice action against his former lawyers, in language worth quoting at length:

A pretrial mediation of the [underlying trademark infringement] suit began at 10:00 a.m. on August 4, 2004. Petitioner attended the mediation, accompanied by his assistant, Michael Paradise, and by ... lawyers Steve Wasserman, David Casselman, and Thomas Speiss. Petitioner and his attorneys had previously agreed he would take no less than \$2 million to resolve the ... suit by assigning his ["global master license"] rights to [a company the petitioner founded, but later engaged the lawyers' representation to dispute the company's ownership,] VDO. However, after hours of mediation negotiations, petitioner was finally told VDO would pay no more than \$1.25 million. Though he felt increasingly tired, hungry, and ill, his attorneys insisted he remain until the mediation was concluded, and they pressed him to accept the offer, telling him he was "greedy" to insist on more. At one point, petitioner left to eat, rest, and consult with his family, but Speiss called and told petitioner he had to come back. Upon his return, his lawyers continued to harass and coerce him to accept a \$1.25 million settlement. They threatened to abandon him at the imminently pending trial, misrepresented certain significant terms of the proposed settlement, and falsely assured him they could and would negotiate a side deal that would recoup deficits in the VDO settlement itself. They also falsely said they would waive or discount a large portion of his \$188,000 legal bill if he accepted VDO's offer. They even insisted on accompanying him to the bathroom, where they continued to "hammer" him to settle. Finally, of paid night, after 14 hours of mediation, when he was exhausted and unable to think clearly, the attorneys presented a written draft settlement agreement and evaded his questions about its complicated terms. Seeing no way to find new counsel before trial, and believing he had no other choice, he signed the agreement."

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The trial court ruled evidence of all this inadmissible, based on a "plain meaning" construction of Evidence Code section 1119. The California Supreme Court affirmed.

And Michael Cassel was left without admissible evidence to support his cause. He never got his claim heard on its merits. Was his cause just? We'll never know. An opportunity to be heard on the merits was denied him.

California Supreme Court Justice Ming Chin was moved to write separately:

I concur in the result, but reluctantly.

The court holds today that private communications between an attorney and a client related to mediation remain confidential even in a lawsuit between the two. This holding will effectively shield an attorney's actions during mediation, including advising the client, from a malpractice action even if those actions are incompetent or even deceptive. Attorneys participating in mediation will not be held accountable for any incompetent or fraudulent actions during that mediation unless the actions are so extreme as to engender a criminal prosecution against the attorney. This is a high price to pay to preserve total confidentiality in the mediation process." [Footnote and internal reference omitted.]

Commentators noticed. This author was among them. See Jeff Kichaven, "Mediation, Confidentiality and Anarchy: The California Nightmare," Daily Journal (Los Angeles) at p. 4 (Feb. 17, 2011).

The California Legislature also noticed, and asked the California Law Revision Commission to study the issue and make recommendations as appropriate. It is called Study K-402 (available at www.clrc.ca.gov/K402.html).

After years of careful work, the commission on June 8 concluded Study K-402 by recommending to the legislature that it amend the California Evidence Code. See the final version of the tentative recommendation at http://bit ly/2rIuTvF; a press release with instructions

for commenting on the proposal is available at http://bit.ly/2t0UyE8. A comment period was set to run this summer and conclude in September.

The amendments would allow consumers like Michael Cassel, who claim legal malpractice in a mediation, to introduce the evidence they need to prove their claims. Or, at least, most of that evidence.

While the commission's work gets almost all the way to the cause of justice, and descrives praise for that reason, it needs to take one more step.

PROPOSAL NEAR

The commission's tentative recommendation on Study K-402, in Memorandum 2017-18 Calif. L. Rev. Comm'n (April 13, 2017)(available at http://bit.ly/2s7qYMs) the commission's staff included the text of a proposed Section 1120.5 to the California Evidence Code, which would provide in part as follows:

- (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if both of the following requirements are satisfied:
 - (1) The evidence is relevant to prove or disprove an allegation that a lawyer breached a professional requirement when representing a client in the context of a mediation or a mediation consultation.
 - (2) The evidence is sought or proffered in connection with, and is used solely in resolving, one of the following:
 - (A) A complaint against the lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act.
 - (B) A cause of action for damages against the lawyer based upon alleged malpractice.
 - (C) A dispute between a lawyer and client concerning fees, costs, or both including a proceeding under the State Bar Act, Chapter 4, Article 13-Arbitration of Attor-

(continued from previous page) neys' Fees, Business & Professions

Code Sections 6200-6206.

The final recommended version added a third paragraph, which must be satisfied along with (1) and (2) above:

(3) The evidence does not constitute or disclose a writing of the mediator relating to a mediation conducted by the mediator.

The final proposal included additional sections mostly on its operational procedures. (See proposed 1120.5(b)-(e) at the link above.) But the key provisions highlighted above, if enacted, would go a long way toward protecting consumers such as Michael Cassel and promoting the rule of law. It would allow Cassel to have a hearing on the merits. Or, at least, most of the merits. There's one gap left which the commission should recommend that the legislature fill.

ONE MORE CHANGE

The California Law Revision Commission has not yet included in its recommendation any proposed changes to California Evidence Code Section 703.5. If it would do so, consumers would be more completely protected and the rule of law would be more completely promoted, all without doing any harm to the efficacy of mediation.

The commission should take this step. California Evidence Code Section 703.5 provides, in pertinent part:

No person presiding at any judicial or quasijudicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. ...

So, under the commission's draft tentative

recommendation, the Cassels of the future could testify. They could subpoena their former lawyers to testify. But they could not obtain the testimony of their mediators, even if their mediators volunteered to come forward.

Their mediators would not be competent to testify. This could frustrate the administration of justice in at least two situations.

First, consider the classic "he said/she said" scenario. A future Cassel testifies, truthfully, that his lawyer gave him negligent advice "X" at a mediation. His lawyer denies it. The mediator heard the advice given, and would so testify, if given the chance.

For the plaintiff, this is an anxious situation. He has the burden of proof. His evidence must preponderate. While a jury might find his testimony more persuasive than that of his former lawyer, it also might not.

How dearly this plaintiff wants, indeed needs, the mediator to testify. But California Evidence Code Section 703.5 denies the plaintiff that proof. There's a need to amend Evidence Code Section 703.5 to help make sure that all relevant evidence is admissible so that cases are correctly decided, consumers are protected, and the rule of law promoted.

And, on the flip side of this same coin, a defendant might need a mediator's testimony to rebut incorrect or opportunistic testimony given by a former client who is now suing her. Due process has to work in both directions.

Second, consider the situation where an opportunistic defendant throws a mediator under the bus. Assume that our future Cassel testifies that his lawyer gave him advice "X" and that the advice was negligent. The lawyer testifies that advice "X" was indeed given, and goes on to testify that the advice was not negligent, but rather was reasonable.

Why? Because, in a private conversation with the mediator during the mediation, the mediator told him to give that very advice. Is this lawyer lying? Can this lawyer get away with it if he is? Maybe.

Section 703.5 bars our future Cassel from calling that mediator as a witness to test the veracity of the lawyer's defense. A future Cassel might well find justice denied as a result.

Particularly in the second situation, one would think that mediators would want, even insist on, the chance to testify and set the record straight. Otherwise, opportunistic witnesses (continued on next page)

(continued from previous page) could offer (imaginary) hearsay testimony of all sorts of foolishness attributed to mediators.

This could damage a mediator's reputation for wisdom and integrity, with the mediator defenseless to respond. Unable to testify in the proceeding in which the hearsay is offered, what is the mediator to do to protect herself and her reputation?

Instead, the commission proposes building a fence around 703.5, so that mediators will participate in these follow-on legal malpractice cases even less than they otherwise might. (See proposed Evidence Code sections 1120(5)(a)(3) and 120.5(e).) This is supposedly "to safeguard perceptions of mediator impartiality and protect[] a mediator from burdensome requests for testimony." (Tentative Recommendation at p. 137.) But there is no evidence from other jurisdictions with lesser confidentiality that, without this fence, California mediators, or mediation, would suffer in these regards, either.

EFFECTIVENESS 'WILL CONTINUE'

Importantly, when the California Evidence Code is amended, mediation will continue to be an effective process in California, as it is elsewhere.

In states governed by the Uniform Mediation Act, the mediation privilege gives way so that a consumer can bring a legal malpractice action against their lawyer-UMA Sec. 6(a) (6)—and all relevant evidence is admissible in those malpractice actions, even the testimony of mediators. UMA Sec. 7(b)(2).

The UMA is the law in several jurisdictions with major urban, commercial centers, including, from west to east, Washington, Illinois, Ohio, New Jersey and the District of Columbia. There is no evidence that mediation is used less often, or less effectively, in these jurisdictions as a result.

In New York, there is even less protection of mediation confidentiality, with no evidence of adverse effects on the use or effectiveness of mediation. In New York, CPLR 4547 protects only this:

Evidence of (a) furnishing, or offering or promising to furnish, or (b) accepting, or offering or promising to accept, any valuable consideration in compromising or

attempting to compromise a claim which is disputed as to either validity or amount of damages, shall be inadmissible as proof of liability for or invalidity of the claim or the amount of damages. ...

There is no evidence that this minimal statutory level of confidentiality has inhibited the use of mediation, or harmed its effectiveness, in New York. Neither is there any such evidence from the federal system, which has the same minimal statutory confidentiality standard, set forth in Rule 408 of the Federal Rules of Evidence.

The history of New York's experience proves even more clearly that mediation can thrive under the minimal levels of confidentiality which CPLR 4547 and FRE 408 provide.

The Uniform Mediation Act was approved by the National Conference of Commissioners on Uniform State Laws in August 2001.

In 2002, the New York Legislature considered the UMA. It was controversial. While the New York City Bar Association supported the UMA (see the association's ADR Committee's February 2002 report at http://bit.ly/2rAyZqg), the New York State Bar Association opposed it. (See the NYSBA's Committee on Alternative Dispute Resolution Nov. 1, 2002, report at http://bit.ly/2rrpmf3.) The New York Legislature did not enact the UMA, and CPLR 4547, with its minimal protection of mediation confidentiality, remained the law.

Then, a case called Hauzinger v. Hauzinger 43 A.D.3d 1289 (N.Y.A.D. 2007)(available at http://bit.ly/2rAzDEc), attracted quite a bit of attention. In that divorce action, attorney Carl Vahl served as mediator. After the mediation, Mrs. Hauzinger subpoenaed Vahl to produce records and to testify in a proceeding to determine whether the terms of the Hauzingers' separation agreement "were fair and reasonable at the time of the making of the agreement."

Vahl moved to quash the subpoena on grounds, among others, that the Hauzingers had signed a confidentiality agreement. The trial court refused to quash the subpoena, and the Appellate Division affirmed, notwithstanding the confidentiality agreement which the Hauzingers had signed.

The Appellate Division's opinion in Hauzinger provoked dire, dire Jeremiads from New York's mediation establishment. One sample screed can be found at Abby Tolchinsky & (continued on next page)

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Ellie Wertheim, "Hauzinger' Calls Into Doubt Confidentiality Agreements," N.Y. Law J. (Nov. 13, 2007)(available at http://bit.ly/2rr8kOq).

The immediate issues arising from the Appellate Division's Hauzinger opinion were resolved by New York's highest court, the Court of Appeals, in June 2008, when it issued its Memorandum Opinion noting that both spouses had expressly waived whatever confidentiality attended their mediation. Hauzinger v. Hauzinger, 10 N.Y.3d 923 (2008)(available at http://bit.ly/2rAtmZc); see also "New York's Top Court Backs Mediator Subpoena in a Divorce Case," 26 Alternatives 154 (September 2008)(available at http://bit.ly/2sG4xug).

Therefore, Mediator Vahl was permitted to produce documents and testify without objection. But the larger issue of the extent of mediation confidentiality in New York remained.

Despite the entreaties of New York's mediation establishment, the legislature did not act. Neither the UMA, nor any other new statute, was enacted. The minimally-protective CPLR 4547 remained, and remains, the law of the Empire State.

The sky has not fallen.

New York remains a robust and dynamic mediation marketplace. Private ADR provider JAMS lists 85 New York City-based neutrals on its website at http://bit.ly/2suqSfd. In the federal courts, New York's Eastern District, based in Brooklyn, N.Y., lists 206 mediators practicing on its panel. See list at http://bit.ly/2rUYplA. In the Manhattan-based Southern District, the number is 301! See list at http://bit.ly/2qWkhrF.

There is no evidence that in streetwise New York, with the minimal mediation confidentiality which CPLR 4547 and FRE 408 provide, people have been scared off using mediation, or that legal malpractice actions arising out of mediations have mushroomed.

How much less does California have to fear those horribles, with only the slight modification to mediation confidentiality now under consideration?

Month after month, the California mediation establishment has been challenged to show the state's Law Revision Commission some actual evidence that lesser standards of mediation confidentiality have caused problems—in New York, in UMA states, or anywhere else. Month after month, the establishment has shown not even a peppercorn's worth of actual proof.

THE BIG PICTURE

At heart, the rule of law is simply the principle that for every wrong-every breach of contract, violation of statute and tort-the legal system provides a remedy.

Our basic U.S. values have always emphasized the rule of law. Indeed, on Jan. 21, 2009, his first full day in office, President Barack Obama announced that "Transparency and the Rule of Law will be the touchstones of this Presidency."

To enforce the rule of law, courts must be able to determine the truth. That's why, "Except as otherwise provided by statute, all relevant evidence is admissible." California Evidence Code Section 351. See also, Rule 402, Federal Rules of Evidence.

That is also why it has always been the case, since Prof. John Henry Wigmore first set down the analysis, that "all privileges of exemption from this duty [to give relevant evidence] are exceptional, and are therefore to be discountenanced. There must be good reason, plainly shown, for their existence.... The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges. They should be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice." 8 Wigmore on Evidence Section 2192 (McNaughton ed. 1961).

Plainly, California's mediation confidentiality statute provides just such an "obstacle to the administration of justice." If we care about the rule of law, we must ask: Is there "good reason, plainly shown," for this degree of mediation confidentiality?

The empirical evidence does not support the California Legislature's outdated assumption that the encouragement of mediation requires broad statutory confidentiality. To adopt Wigmore's classic test: Do we have the rules of mediation confidentiality "within the narrowest limits required by (the) principle," of encouraging mediation?

Based on the experience of New York, the federal system and the UMA states, the answer is clearly "no."

It's time to applaud the California Law Revision Commission for its work to date, which promises to move California law in the right direction, toward consumer protection and the promotion of the rule of law. The commission should continue its good work, and add to it by proposing amendments to California Evidence Code Section 703.5.

Alternatives' most recent examination of mediation confidentiality trends is Richard Ziegler's "Where Are the Risks? An Assessment of Recent Developments in Mediation Confidentiality," 34 Alternatives 161 (December 2016) (available at http://bit.ly/2qYLUEO). For more background on the Cassel controversy, see Eric Van Ginkel, "Another Look at Mediation Confidentiality: Does It Serve Its Intended Purpose?" 32 Alternatives 119 (September 2014), as well as "Where Mediation Hurts Clients: How ADR Is Shielding Legal Malpractice," 30 Alternatives 195 (November 2012)(available at http://bit.ly/2ejgcKy).



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July 18, 2017

Sent via email: bgaal@clrc.ca.gov

Barbara Gaal, Esq.
California Law Revision Commission
c/o UC Davis School of Law
400 Mrak Hall Drive
Davis, CA 95616

RE: Relationship Between Mediation Confidentiality and Attorney Malpractice (Study K-402)

Dear Ms. Gaal:

I support The Commission's effort in creating an exception to confidentiality in mediation. The tentative recommendation upholds the intent of my original CCBA resolution to protect mediation clients from incompetent attorneys, while maintaining confidentiality to the maximum extent possible. The Commission's research has been exhaustive and it has reached a well drafted tentative recommendation. Some mediators and attorneys feel The Commission has gone too far in creating an exception but they lose sight of the consumer, the public. Thank you for doing a job well done.

Elizabeth A. Moreno, Esq.

Very truly yours,

John E. Porter Deborah Blair Porter

1156 5th Street, Manhattan Beach, CA 90266 (310) 379-0386 (home) – (310) 977-5377 (cell) E-mail: deborah.blair.porter@gmail.com

September 1, 2017

VIA EMAIL TRANSMISSION

Barbara Gaal, Chief Deputy Counsel California Law Revision Commission 4000 Middlefield Road, Room D-2 Palo Alto, CA 94303

Re: Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct – June 2017 Tentative Recommendation

Dear Chief Deputy Counsel Gaal:

I am writing to provide input to the California Law Revision Commission ("CLRC") with regard to its June 2017 Tentative Recommendation. I am submitting this input on behalf of myself and my husband, John E. Porter.

First, however, I wish to express our appreciation for the Study process the CLRC has undertaken, including its comprehensive review of relevant material, detailed analysis and thoughtful approach. We greatly appreciate the acknowledgement and careful consideration given to the input submitted to the Commission, including our own, which can't help but ensure that those providing input feel heard and their views respected. I specifically wish to thank CLRC staff, in particular you and Brian Hebert, who have always been extremely professional and responsive to my inquiries and input throughout this multi-year process.

I would like to state that we emphatically and wholeheartedly support CLRC's Tentative Recommendation, both the language of the proposed Section 1120.5, and how it will fit with the current statutory framework and language of the Evidence Code. The only change we would suggest at this time is that the effect of this legislation be grandfathered for those cases which began before the Study but which are still pending when the law eventually takes effect.

We hope this Recommendation will lead to legislation that will result in a course correction on what has clearly become a hazardous mediation landscape, so that mediation and mediation confidentiality focus on the needs of the *persons* for whom mediations are conducted and for whom the original legislation regarding mediation confidentiality was enacted, i.e., the parties/disputants seeking to resolve their disputes over events in the past.

We hope that the proposed exception to mediation confidentiality will protect the parties/disputants who feel they have been wronged in the mediation process. It is also our hope that the adoption of such an exception will prevent the future abuse and misuse of the mediation process, including its use as a shield for the bad acts of incompetent and self-interested attorneys. At the same time we hope the adoption of this exception will allow attorneys who feel wrongly accused to properly defend themselves.

Fundamentally, it is our hope that adoption of this new statutory exception as part of California's Evidence Code will increase accountability for the mediation process and for attorneys in that process, and will increase confidence in the use of mediation as a whole. This will not only benefit the parties/disputants who have been and continue to be at risk for harm and injury when choosing to mediate, but society as a whole.

While I provided input earlier in the Study, I have never taken the opportunity to counter the many arguments and theories proffered with regard to mediation remaining so inviolately absolute and the possible pitfalls if it does not remain so. The legislative evolution of the current law on mediation confidentiality described in the Recommendation provides an opportunity, as well as historical context, to counter what is conjecture, unsupported claims, and dire predictions (and in far too many instances "red herring" arguments).

While my input discusses aspects of my previous input, it primarily make points about how the historical context of the law regarding mediation confidentiality is significant, how the law has evolved to the absolutist approach reflected in *Cassel*, but also how *Cassel* and other decisions have ignored and strayed from the original legislative intent. I also highlight how current case law reflects a bias in favor of attorneys which I do not believe is justified by the legislative history.

The historical context demonstrates that not only is mediation confidentiality presently interpreted in a manner that works to the detriment of the general public, this is due, in part, to what appears to have been a failure to involve the general public or parties/disputants in the processes undertaken in enacting past legislation, as well as a failure to consider how such legislation can impact parties/disputants and the public in general.

Again, my main purpose is to express our support for CLRC's Recommendation and to urge the Commission to remain steadfast in its commitment to it, particularly against what we understand will likely be fierce opposition. At this juncture, based on our review of the legislative history, this CLRC Study appears to be the only time input of parties/disputants and the general public has been expressly sought, provided and/or considered as relevant "stakeholder" input. As parties/disputants, members of the special education community and the general public, we are grateful for such consideration.

Evolution of Mediation Confidentiality and How It Has Impacted the Rights of Parties/Disputants

Any consideration of mediation confidentiality, including how and to whom it should apply, must consider the evolution of the legislative history of mediation confidentiality, including how it has increasingly been interpreted in favor of non-party attorney participants as against the interests of party/disputants.¹

1965

As the Recommendation explains, Evidence Code Sections 1152 and 1154, originally enacted on Commission recommendation in 1965, restricted admissibility of evidence of settlement negotiations. Specifically, EC §1152(a) referred to evidence "that *a person* has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act or service *to another* who has sustained or will sustain or claims that *he* has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove *his* liability for the loss or damage or any part of it." (Recommendation, page 23, Footnotes ("Fns.") 110, 111, and 114 (page 245).

As the Recommendation also notes, "Those provisions remain in place today", "are based on the public policy favoring settlement of disputes without litigation" and "help foster 'the complete candor *between the parties* that is most conducive to settlement." (Recommendation, page 23 and Footnotes 111 and 112)

Early 1980's

However, in the early 1980's, based on the belief that EC §§1152 and 1154, "provide only limited assurance that comments a *party* makes in such negotiations will not later be turned against the *party*," new evidentiary provisions regarding mediation

¹ I greatly appreciate the Recommendation's concise articulation of the legislative history of mediation confidentiality as it enabled me to see, for the first time, how the current problems with mediation seem to be a direct result of changes to the evidence code, including the removal of certain notice elements found in the original confidentiality provisions, that took place in the absence of participation of the general public as "stakeholders" in the process. If the Commission believes I have incorrectly read the legislative history, I would appreciate being informed of it.

were enacted, including new provisions to "protect oral and written information disclosed in a mediation from subsequent disclosure in a judicial proceeding." (Recommendation, Page 24, Fn. 114 *Recommendation Relating to Protection of Mediation Communications*, 18 Cal. L. Revision Comm'n Reports 241, 245 (1985) (hereafter, "CLRC Mediation Recommendation #1"))

However, these new provisions would only apply to a mediation if the persons who conduct or otherwise participate agreed in advance and in writing that the protection would apply. In other words, there was no mediation confidentiality u*nless* those mediating agreed to it *in advance* and *in writing*. (*Id.* at 245-247)

Specifically, EC 1152.5 to be added to the Evidence Code read:

- (a) Subject to the conditions and exceptions provided in this section, when *persons* agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving *a dispute*:
- (1) Evidence of anything said of or any admission made in the course of the mediation is not admissible in evidence, and disclosure of any such evidence shall not be compelled, in any action or in any proceeding in which, pursuant to law, testimony can be compelled to be given; and
- (2)(b) This section does not apply unless, before the mediation begins, the persons who agree to conduct and participate in the mediation execute an agreement in writing that sets out the text of this section and states that the persons agree that this section shall apply to the mediation. Notwithstanding the agreement, this section does not limit the admissibility of evidence if all persons who conducted or otherwise participated in the mediation consent to its disclosure."

The use of the terms "persons" and "dispute" in subpart (a) indicates a clear intent the provisions were being enacted primarily for the "persons" with the "dispute" who were seeking to resolve same. This essentially confirms the language originally used in 1965 in the provisions for settlement agreements, i.e., a "person" who has furnished or offered to furnish something to "another." (See also, note 4 at page 246 of Recommendation #1 which states the "The requirement of a written agreement will impose no burden on the mediator; the mediator can have the parties execute a form agreement before the mediation begins. However this requirement will limit the protection to cases where the parties have agreed that this protection should apply.")

Essentially, these new provisions ensured advance notice to the parties of the availability of mediation confidentiality and thus gave them the choice to have - or not have - confidentiality. In addition, advance agreement to choose mediation confidentiality included a writing, meaning that parties/disputants taking part in a mediation had this option reiterated for them. Such an explicit requirement ensured a

party/disputant was aware of the availability of mediation confidentiality and could decide NOT to agree to this option with its new protections. If they did agree, however, it would be clearly memorialized. Again, it was "the parties" who were to sign any agreement indicating the provisions protecting mediation confidentiality. As before, with the provisions affecting settlement negotiations, "it was based on the public policy favoring settlement of disputes without litigation." (Recommendation, page 24, Fn. 120)

1993

In 1993, the California Legislature enacted Senate Bill 401 (Lockyer), that was "the product of negotiations between key stakeholders" including "the Judicial Council, the State Bar of California, the California Trial Lawyers Association [now known as the Consumer Attorneys of California], the California Judges Association, the California Defense Counsel, the Los Angeles County Bar Association, representatives of the mediation community, and the author's staff." (Recommendation, Page 25 and Fn. 122).

"All of those groups "agree[d] that mediation can be an effective tool to resolve civil disputes in a fair, timely, and cost-effective manner" (*Id.*) "The 1993 bill also created a mandatory mediation pilot project, which was based on legislative findings recognizing the benefits of mediation." (Recommendation, Page 25, (Fn. 129).

However, the revisions:

- Eliminated the requirement of a written agreement to invoke the statutory protection for mediation communications and documents. (Recommendation, Page 25, (Fn. 126)
- Expressly protected mediation communications and documents from disclosure in civil discovery, not just from being admitted into evidence. (Recommendation, Page 25, (Fn. 127)
- Made mediation communications confidential. (Recommendation, Page 25, (Fn. 128).

Nowhere in the record is there any indication the "stakeholder" groups involved in this legislation included representatives of non-attorney individuals or groups, the general public or individuals who presently or previously had been involved in litigation. None among them seemed to represent a viewpoint on mediation and mediation confidentiality that was separate or distinct from the attorney stakeholders or those representing attorney interests, the interests of the judiciary and the legal/judicial community in general.

As a result, it appears that neither the interests nor the perspectives of the non-legal general public or parties/disputants were considered. Nor does it appear any consideration was given to how harmful it might be to parties/disputants to remove the notice requirements related to mediation confidentiality, in the form of the previously

required agreement to mediation confidentiality, at the same time mediation confidentiality became the standard, without regard to the choice of any party/disputant.

In retrospect, this seems a significant oversight, particularly to a layperson, especially since the general public (including "parties" who litigated "their disputes)" was ostensibly the focus of the Legislature's findings, in connection with its a pilot project, that mediation was in "the public interest." (See CCP §1775(c). In fact, the "parties", "their disputes" and the "public interest" are all over the language pf CCP §1775, at the same time their input does not appear to have been solicited.

- (b) In the case of many disputes, litigation culminating in a trial is costly, time consuming, and stressful for the parties involved. . .
- (c) Alternative processes for reducing the cost, time, and stress of dispute resolution, such as mediation, have been effectively used in California and elsewhere. In appropriate cases mediation provides parties with a simplified and economical procedure for obtaining prompt and equitable resolution of *their* disputes and a greater opportunity to participate directly in resolving these disputes. Mediation may also assist to reduce the backlog of cases burdening the judicial system. It is in the *public interest* for mediation to be encouraged and used where appropriate by the courts.
- (d) Mediation and similar alternative processes can have the greatest benefit for the parties in a civil action when used early, before substantial discovery and other litigation costs have been incurred. Where appropriate, participants in disputes should be encouraged to utilize mediation and other alternatives to trial for resolving their differences in the early stages of a civil action.²

As a result of the exclusion from this 1993 legislative process of the very parties for whom mediation is ostensibly convened, i.e., "parties/disputants" and the general public, it appears the ONLY participants in the development of this new legislation were attorneys and the judiciary, i.e., those who controlled it and those who in certain cases would eventually come to benefit from it to the detriment of certain parties/disputants.

² It is worth noting that many of the more recent cases use both "parties" and "participants" at times distinguishing them and other times using them interchangeably. However, the legislative history seems clear that non-party participants are not "parties" nor are they the ones with "disputes" which relate to events in the past. This blurring of the terminology and its meaning ignores the history of the language used as well as the purpose of mediation and also gives the strong impression courts have played fast and loose with such terminology to protect mediation confidentiality in its most absolute form, for the benefit of attorneys and without regard to the rights or interests of the parties/disputants who are the litigating public. Such use also ignores the complete history of how mediation confidentiality has evolved and that the courts have interpreted it in a manner that not only defies common sense, but can work to the detriment of the parties who are supposed to use it to resolve their disputes.

The belief that mediation provided a benefit was not based on the needs or input of "parties" or the general public, and instead was based on the needs and interests of those in the legal and judicial arena.

In sum:

The litigating/mediating "parties/disputants" and general public were not involved in the development or enactment of this legislation which from that point forward led to a significant change in the way mediations were conducted in California.

The only "stakeholders" apparently involved in the development and enactment of this legislation were those who determined how and whether mediation confidentiality provided any advantage or benefit and who in fact would benefit from it, i.e., attorneys, groups which represented them and the judicial system, and thus they controlled the conversation, which does not appear to have included any discussion of the impact such changes could have on parties/disputants or the public considering mediation.

Mediations from that point forward all included mediation confidentiality, without the knowledge of the mediation parties/disputants that mediation confidentiality was in place, was absolutely protected, whether they agreed with it or not, at the same time attorneys representing them, had this knowledge.

In addition, the new legislation specifically extinguished the role of the party/disputant in determining whether or not mediation confidentiality even applied to their mediation.

As well, the removal of the previous provision requiring agreement of the mediating parties for mediation confidentiality to be in effect and a writing evidencing same not only meant mediation confidentiality became the status quo, the removal of these provisions eliminated any notice for the unsuspecting general public of what the law had been previously. ³

Ironically, Footnote 126 of the Recommendation states "Apparently, the requirement of a written agreement was considered *onerous*, particularly in disputes involving *unsophisticated persons*." (Emphasis added). First, this contradicts Note 4, in CLRC Recommendation #1, discussed above, regarding the 1980 changes to the Evidence Code, which found it would not be a burden to the mediator to have a written agreement, which he could have the parties sign before the mediation begins. However, the remainder of that note continues "However this requirement will limit the protection to the cases where *the parties have agreed that this protection should apply*." This seems to indicate it may not have been that it was seen as *onerous*, rather eliminating the agreement requirement also eliminated a party/disputant's knowledge and choice regarding confidentiality. As a result, not only did a party/disputant no longer have the right to notice or self-determination regarding whether a mediation should be confidential, their only right to notice was eliminated *for their own good*, as if even knowing

1997

According to the Recommendation, the current statutory scheme was enacted in 1997 pursuant to AB 939 (Ortiz). It appears changes at that time mostly related to the mediator and according to the Recommendation there was no significant opposition. Again the "major stakeholders" (listed in the legislative analyses) did not include the general public or anyone specifically representing the interests of parties/disputants. (Recommendation page 27 and Footnote 135). ⁴

Discussion

In the Legislature's 1993 revisions to the Evidence Code, input from the non-attorney general public was neither solicited nor considered in determining significant changes to the law and its benefits. As a result, not only was the general public excluded from a process that was supposedly for their benefit and to meet their needs in mediation, the only notice or protections for them were eliminated.

This goes a long way toward explaining the evolution of the <u>absolute nature</u> of mediation confidentiality particularly as it operates today: legal opinions handed down since the 1993 changes to the law (e.g., *Cassel*, which cites to the most recent 1997 statutory changes as part of its analysis), demonstrate the interests of the general public and in particular "parties/disputants" – come in a distant second to the importance of the absolute nature of mediation confidentiality.

The interests of the public and "parties/disputants" are also secondary to those of nonparty participants, in particular attorneys who at the same time they have significant professional and ethical responsibilities for the interests and welfare of their party clients, routinely benefit from a shroud of secrecy in mediation that is *neither warranted*, *nor historically based*. This is true even in those cases where legal interpretations have been clearly detrimental to parties/disputants, i.e., the "public" in "public interest" routinely asserted as a justification for mediation and mediation confidentiality. In fact, many legal opinions seem burdened with a blatant and untoward bias in favor of attorneys, who, while officers of the court, are not held to account by it. It is not surprising the CLRC takes pains to point out "the Commission was not involved in the process." (Recommendation Page 25, Fn. 123).

about it was apparently too much for them! This self-serving determination was certainly not made for the benefit of the litigating public!

⁴ Part of the 1997 reform involved "providing specific guidance on when mediation ends for purposes of applying mediation confidentiality. (*See* Evid. Code § 1125)" (Footnote 142 at page 28). This issue is significant in the pending *Porter v. Wyner* action. If the Commission is interested, I would be happy to forward recent relevant court rulings.

Common sense dictates that mediation is for the parties/disputants whose disputes need resolving and who benefit from a speedy and fair process. Yet, the perspective of parties/disputants, who used to have a choice regarding whether or not their mediation would be confidential and had notice and a writing about it, have had those rights eliminated without notice or consideration of their rights or perspective.

Many who have provided comments to this Study insist on the absolute nature mediation confidentiality and claim it is necessary for mediation's continued success. Their confidence in their arguments leads one to believe their comments are based on the history of the law, that absolute protection for mediation confidentiality has always been the Legislature's intent, and that it is necessary and good for mediation and the public. But the legislative history does not support this position. As well, the 1993 changes to the statute not only were not in the interests of the party/disputant, they have not been beneficial to the mediating public, and actually raise questions involving lack of notice, consent and thus implicate due process.

It is now obvious why there is such vociferous opposition to this Study and the changes to the law that have been proposed - after twenty years, during which absolute mediation confidentiality has reigned supreme and attorneys have been able to engage in unscrupulous practices without scrutiny or accountability to the detriment of the rights and interests of the mediating public, members of the attorney bar in California have stood up for the public interest by calling for legislation and advocating for this Study.

As well, CLRC has undertaken this Study and done an excellent job in examining and laying bare the significant problems facing the California judicial system, delivering the resulting Tentative Recommendation. The CLRC Study and Recommendation will hopefully lead to a major reset of a very broken process which has compromised the efficiency, accountability and integrity of mediation in our state. Hopefully, California's legal and judicial community will take responsibility for two decades of ignoring the critical perspective that has been missing in mediation and mediation confidentiality, i.e., that of the parties/disputants and the general public.

Exceptions - Cassel -

I would also like to discuss *Cassel v. Superior Court* case (S178914, 01/13/11), in the context of that case's treatment of three of the exceptions to mediation confidentiality discussed in the Tentative Recommendation (at page 30), specifically, the exceptions related to "constitutional rights," "absurd results," and "express agreement to waive protection" all of which I believe are directly connected to the evolution of mediation confidentiality, the 1993 changes to the Evidence Code and the impact of such changes on the rights of the "parties/disputants." I also discuss how *Cassel* ignored legislative and statutory history.

Cassel includes several statements related to these points in the 2011 opinion.⁵ (I have highlighted the text to ensure clarity of my points).

"We must apply the plain terms of the mediation confidentiality statutes to the facts of this case unless such a result would *violate due process*, or *would lead to absurd results that clearly undermine the statutory purpose*. No situation that extreme arises here. Hence, the statutes' terms must govern, even though they may compromise petitioner's ability to prove his claim of legal malpractice. (*See Foxgate*, *supra*, 26 Cal.4th 1, 17; *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137, 163 (*Wimsatt*).) ⁶

"Pursuant to recommendations of the California Law Revision Commission, the Legislature adopted the current version of the mediation confidentiality statutes in 1997. (*Simmons*, *supra*, 44 Cal.4th 570, 578.)" ⁷

"Judicial construction, and judicially crafted exceptions, are permitted only where *due process* is implicated, or where literal construction would produce *absurd* results, thus clearly violating the Legislature's presumed intent. Otherwise, the mediation confidentiality statutes must be applied in strict accordance with their plain terms. Where competing policy concerns are present, it is for the Legislature to resolve them. (Simmons, supra, 44 Cal.4th at pp. 582-583; Foxgate, supra, at pp. 14-17.)"8

"Moreover, we pointed out, there was no justification to ignore the plain statutory language, because *a literal interpretation neither undermined clear legislative policy nor produced absurd results*. As we explained, the Legislature had decided that the candor necessary to successful mediation is promoted by shielding mediation participants from the threat that their frank expression of views during a mediation might subject them to sanctions based on the claims of another party, or the mediator, that they were acting in bad faith. (*Foxgate*, *supra*, 26 Cal.4th 1, 17.)"

"... a communication or writing "made or prepared for the purpose of, or in the course of, or pursuant to" a mediation may be disclosed or admitted in evidence if (1) all participants in the mediation expressly so agree in writing, or orally as prescribed in section 1118 (§ 1122, subd. (a)(1)), or (2) the communication or writing was prepared "by or on behalf of fewer than all the mediation participants," those participants expressly so agree in writing, or orally as

⁵ http://scocal.stanford.edu/sites/scocal.stanford.edu/files/opinion-pdf/S178914-1294941609.pdf

⁶ *Id.* at page 3

⁷ *Id.* at page 9.

⁸ *Id.* at page 11.

⁹ *Id.* at page 12.

prescribed in section 1118, and "the communication . . . or writing does not disclose anything said or done or any admission made in the course of the mediation" (§ 1122, subd. (a)(2))." ¹⁰

Discussion

At page 9, *Cassel* analyzes the mediation statutes in the context of the "current" version of the statute from 1997. As discussed above, this considers mediation and mediation confidentiality within an abbreviated, and thus inaccurate, historical context which ignores how mediation confidentiality actually evolved, the significant changes that deprived parties of their rights and how the rights of parties and the general public have been ignored in that process. *See*, above analysis regarding the 1985 and 1993 changes to mediation and mediation confidentiality.

Further, contrast the statement at page 15, Footnote 6 (... a communication or writing "made or prepared for the purpose of, or in the course of, or pursuant to" a mediation *may be disclosed or admitted in evidence if (1) all participants in the mediation expressly so agree in writing,* or orally as prescribed in section 1118 (§ 1122, subd. (a)(1)), or (2) the communication or writing was prepared "by or on behalf of fewer than all the mediation participants," those participants expressly so agree in writing, or orally as prescribed in section 1118, and "the communication . . . or writing does not disclose anything said or done or any admission made in the course of the mediation" (§ 1122, subd. (a)(2)) with the previous requirement from the 1980's of express agreement on the part of the parties in order to have their mediation be confidential, which was set aside in the 1993 provisions in favor of mediation confidentiality without the involvement, knowledge or consent the very parties who are mediating! This also begs the question, how can a party be expected to enter into an "express agreement to waive protection" when they have no knowledge of such an agreement or that they in fact can do so?

Besides the fact that this analysis ignores the express language and intent of the original mediation provisions, the *Cassel* court's interpretation shows how the interpretation of "participants," including nonparty participant attorneys, has overshadowed and taken precedence over the rights of the mediating parties. How is this not an absurd result, particularly in the context of the law developed without the input of the party/disputant and without consideration of how the law's changes would impact the party/disputant? There is a principle often voiced in the healthcare and disability arenas: "Nothing about me, without me." This Study is a prime example of how that principle has a place in today's discussions regarding mediation confidentiality in California.

¹⁰ *Id.* at page 15, Footnote 6.

Furthermore, *Cassel's* blithe conclusions at pages 11 and 12 about "the Legislature's presumed intent" and that damage to parties neither violated due process rights nor led to an absurd result (despite the fact that the parties for whom the process was supposedly established are not only NOT benefiting by it, but are being saddled with additional, further harm in the form of further litigation arising out of the bad acts of attorneys in the mediation itself) is bad enough. That this harm is at the hands of a nonparty participant attorney, who has ethical obligations and fiduciary duties to the parties/disputants, which the court is itself bound to uphold, is insensitive at best, callously self-serving at worst and certainly an absurd result.

They say when we don't know our past, we can't learn from or correct its mistakes. However, this is the highest court of the State of California intentionally choosing to ignore that past AND the mistakes on the part of attorneys and officers of the court it is responsible for overseeing and disciplining. There is no better evidence of the bias of the courts – again, a decision of attorneys, by attorneys, for attorneys – which resulted from these 1993 changes to the Evidence Code and work to the detriment of the very public they are supposed to be serving.

In 1993 when the law was changed without the input of the general public, the effect of the legislation was to:

- Take away the statutory right of a party to have knowledge they could have mediation without confidentiality.
- Take away the statutory right of a party to self-determination in regard to whether or not to choose confidentiality by establishing confidentiality in all mediations.
- Take away the statutory right of a party to have a written agreement about whether or not they chose mediation confidentiality which in turn negatively impacted their notice rights.
- Impose a new onerous requirement that all participants and not just the parties had to agree to waive mediation confidentiality, thus elevating the rights of the nonattorney participant, including attorneys, to equal that of the parties/disputants in determining confidentiality, and giving an attorney the absolute right to block the desire of any party/disputant to decide to waive mediation confidentiality.

This latter provision played a role in *Porter v. Wyner & Tiffany* ("W&T") (granted and held in connection with *Cassel*). In that case, the parties to the underlying mediation negotiated a waiver of confidentiality as part of our definitive Settlement Agreement, documented by W&T, our legal counsel. However, subsequent to the settlement when a dispute arose, W&T ultimately disavowed the very settlement provision they had drafted and approved as to form, claiming there was no waiver of mediation confidentiality, as

part of their effort to set aside a jury verdict against them. The courts allowed W&T, a nonparty participant, to take control of mediation confidentiality away from the parties to the mediation, despite the parties having agreed to waive it.

This issue was reflected in the *Cassel* oral argument, in which our legal counsel in *Porter* was invited to participate, leading to Justice Chin's seminal question:

"What happens if every participant in the mediation *except the attorney* waives confidentiality. Could the attorney even then prevent disclosure so as to be immune from a malpractice action? I can imagine no valid policy reason for the Legislature to shield attorneys even in that situation. I doubt greatly that one of the Legislature's purposes in mandating confidentiality was to permit attorneys to commit malpractice without accountability. Interpreting the statute to require confidentiality even when everyone but the attorney has waived it might well result in absurd consequences that the Legislature did not intend." ¹¹

The changes to the legislation in 1993 not only affect the constitutional rights of parties, particularly through the denial of participation in the process, as well as the elimination of notice to them of significant changes and the right to provide or not provide consent, it has led to the absurd result where the interests of the parties for whom mediations are supposedly convened are subverted to those of the nonparty participant attorneys who are supposed to be representing them, but in fact are representing their own interests.

At the same time, the burden of setting aside what is now the standard of mediation confidentiality is on the shoulders of the party (which of course assumes the party even knows they have such an option), while the statutory language renders the party powerless against an unscrupulous attorney who can choose to block any party's wish with regard to mediation confidentiality, including refusing to agree to any waiver at will. The Recommendation and the exception it proposes is the only way to right these wrongs.

Finally, I would like to reiterate a point I made in a footnote in prior input, because it seems relevant to the discussion of legislative history and I think it bears repeating. Specifically, in *Cassel* the court *actually relied upon the Uniform Mediation*Confidentiality Act to ("UMA") for the "statutory purpose" of mediation confidentiality, but failed to acknowledge it or explicitly cite it:

The statutory purpose is to encourage the use of mediation by promoting "'"a candid and informal exchange regarding events in the past.... This frank exchange is achieved only if the participants know that what is said in the

¹¹ Cassel concurring opinion, page 3.

¹² http://www.clrc.ca.gov/pub/2015/MM15-36s1.pdf - Footnote 7, pages 18-19.

mediation will not be used to their detriment through later court proceedings and other adjudicatory processes." [Citations.]" (*Foxgate*[, *supra*,] 26 Cal.4th 1, 14)" (*Simmons*, *supra*, at p. 578.)

Instead, *Cassel* cited to *Simmons*, which in turn cited to *Foxgate* but indicated "[Citations]." The citations in *Foxgate* actually stated "The legislative intent underlying the mediation confidentiality provisions of the Evidence Code is clear," citing to "(Nat. Conf. of Comrs. On U. State Laws, U. Mediation Act (May 2001) § 2, Reporter's working notes, P 1"). ¹³

At the same time it relied on the UMA for the "statutory purpose", the *Cassel* court ignored the UMA's provisions related to the role, rights and relationship of a "party" to a "nonparty participant," including an attorney, which seems to demonstrate it is the "party" for whom the process was convened, but also distinguishes "participants" as separate and distinct from their "counsel" who often accompany them to such a process (Reporter's notes 1.2(2), page 11, Lines 7-8); that such a nonparty participant "attorney" is considered a "support" person for the party (Prefatory Note, 1: Role of Law (Page 2, Line 16)); that "mediation confidentiality" is a privilege (Sec. 5, page 22 et seq.); and that while the nonparticipant could be a holder of the privilege (Sec. 5 (b)(4) at page 22), this was a status typically reserved for nonparticipant "experts" (Sec. 5 Rptrs. notes, 4.c, Page 27, Lines 21-28) so that the primary holder of the privilege is the "party" (Sec. 5, Rptrs. Notes 4.a-b, page 26) for whom the mediation is convened, and whose "candor" is what is required to enable a resolution to the dispute.

Ignoring the UMA analysis of the rights of parties vs. participants, including the rights of clients as compared to the attorneys who are supposed to be representing them, seems to go beyond a simple unwillingness to research and confirm an accurate legislative history. Instead, it seems disingenuous, akin to judicial sleight-of-hand and cherry-picking to find portions of the case law which suit one's argument, at the same time ignoring the more accurate or complete reading which doesn't. Such analysis is disheartening, for it leads parties to believe that their input, no matter how right or reasonable, doesn't matter.

Further, it does nothing to instill public confidence in the judiciary's sense of justice and fair play, particularly in light of the clear bias and preference the *Cassel* court has shown for attorneys over parties, without regard to what appear to be clear violations of due process and substantive rights. The only way to address the wrongs this case reflects is for the Recommendation documented by the CLRC to be passed on to the Legislature for passage. I appreciate the CLRC's efforts in making this happen and will be happy to support this endeavor at every step.

¹³ Cassel, pages 9-10.

Conclusion

At page 106, Lines 7 - 16 of the Tentative Recommendation, the CLRC notes that in assessing the potential impact of a particular mediation confidentiality rule:

"[I]t seems reasonable to rely on the *commonsense* notions that people will speak more freely if they are confident their words will not be used to their detriment, and negotiations are more likely to succeed if the participants are able to speak freely.595 Courts and legislatures across the country have made such commonsense, experience-based assumptions for years in establishing provisions that protect mediation confidentiality.

Although commonsense suggests that policymakers should recognize the *existence* of an interest in protecting mediation communications, that does not end the analysis. Policymakers must further decide how much weight to place on that interest and how to balance it against competing interests." [Citations omitted]

I would suggest it is a commonsense notion that people will choose not to speak at all, and will avoid mediation altogether, if parties and the general public are not confident their words will not be used to their detriment in mediating, because, in fact, their attorney, the courts and the entire mediation process has been set up to work against them and their interests, for the benefit of their attorney who is supposed to be representing their interests, but who instead is intent on representing their own interests. Policymakers must consider the due weight that must be given to the rights of the party/disputants, weight that until the CLRC Recommendation has been sorely lacking.

As members of the general public and "parties/disputants" who have participated in and been harmed by the vagaries of mediation confidentiality, we support CLRC's Tentative Recommendation and hope it will bring about the conclusion of a difficult chapter in California's mediation history. We also hope it will lead to greater protections of the rights and interests of parties/disputants, including parents and students involved in special education disputes, who routinely use mediation as the primary means of resolving those disputes. ¹⁴ The needs of this group have generally been overlooked by studies examining the impact of mediation confidentiality, at the same time its effects on their rights are very real. ¹⁵

http://www.gao.gov/assets/670/665434.pdf and https://webcache.googleusercontent.com/search?q=cache:tYSUrsweSWkJ:https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/acccombinedosersdisputeresolutionqafinalmemo-7-23-13.doc+&cd=5&hl=en&ct=clnk&gl=us.

¹⁵ http://www.clrc.ca.gov/pub/2015/MM15-36s1.pdf at pages 26-30.

If the Commission has any questions with regard to this input, please feel to contact me at the address, telephone and email listed above. Also, please excuse any typographical or otherwise inadvertent errors. Again, thank you for your time and for the opportunity to provide this input.

Most sincerely,

Deborah Blair Porter

Deborah Blair Porter

EMAIL FROM PETER ROBINSON (8/29/17)

Re: Mediation Confidentiality Revision

I fully support the proposed revision. I believe the resistance to the revision from the mediation community is short-sighted and that mediation will be held in better esteem in the long run if the revision is approved.

I represented these views at a debate sponsored by the Beverly HIlls Bar Assn. It was interesting that most of the people in attendance were mediators and they were against the revision. The fascinating part is that during the conversation it came out that most of them were family law mediators and most of their clients were NOT REPRESENTED. They opposed the revision because they saw it as the first step to an exception for confidentiality that would hold mediators accountable. (I support that also.)

Keep up the good work and please pass get the revision approved.

Thanks

Peter Robinson Professor of Law Straus Institute For Dispute Resolution Pepperdine School of Law

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JOHN FINBARR HAYES (1932-2016)

July 26, 2017

California Law Revision Commission 4000 Middlefield Road, Room D-2 Palo Alto, CA 94303-4739

re: Relationship between Mediation Confidentiality and Attorney Malpractice and Other Misconduct

Ladies and Gentlemen:

Thank you for publishing your tentative recommendation on the relationship between mediation confidentiality and attorney malpractice and other misconduct. You and your staff have accomplished a through and thoughtful recommendation.

I offer a comment on one aspect of the tentative recommendation, namely paragraph (e) of the proposed Section 1120.5.

In some contexts, the testimony of a mediator may be the only objective evidence of whether attorney misconduct occurred. For example, suppose that, during a breakout session, the mediator meets with one party and that party's attorney. During that breakout session, the attorney tells her client that she will reduce her contingent fee to 20% if the client accepts the other party's latest settlement offer. The client accepts. Later, after the settlement with the other party has been consummated, the attorney demands a contingent fee of 33% in accordance with the original, written fee agreement with the client. In the fee dispute, unless the mediator can testify, the mediator may be the only objective witness to the communications between the attorney and client. The client is disadvantaged by being precluded from calling the mediator to testify.

Conversely, suppose the same scenario, but the fee dispute arises because the client contends that the attorney agreed to reduce her fee to 15%, while the attorney contends that the agreement was to reduce it to 20%. The attorney is disadvantaged by being precluded from calling the mediator to testify.

I can posit other hypotheticals, such as attorney malpractice that occurs during the breakout session, but that would waste your time. My point is that the mediator should

California Law Revision Commission July 26, 2017 Page 2

not be precluded from testifying in a dispute between attorney and client about statements made by them during the mediation if the mediator is the only percipient witness other than the attorney and client, and if the testimony of the mediator is not offered to attack an agreement between the parties to the mediation that resulted from the mediation.

Thank you for considering this comment.

Very truly yours,

Jerome Sapiro, Jr.

js:1112



SILICON VALLEY MEDIATION GROUP

California Law Revision Commission 4000 Middlefield Road, Room D-1 Palo Alto, CA 94303-4739

Re: Relationship Between Mediation Confidentiality and Attorney Malpractice (Study K-402)

Dear Commissioners:

In the 1950s, writers were beginning to address the legal concept of *informed consent* for issues beyond medical concerns, and by the late 1970s, professors Stanley Kaplan and Murray Schwartz wrote comprehensive articles on attorney accountability, ethics, and professionalism. Informed consent, as it relates to an attorney's interaction with a client is not new, so it is surprising that the discussion appears to be in its infancy with respect to mediation.

The Business Dictionary defines informed consent as: "Consent given with full knowledge of the risks involved, probable consequences, and the alternatives." (Emphasis added.) So how is keeping the fact that attorney and mediator malpractice is protected a big secret, passing the informed consent test?

Resisters to the Commission's recommendation claim that no one will want to say anything, because it will not be confidential. One has to ask, "Upon what is this claim based?" It certainly is not based on any factual evidence from the states that have adopted the Uniform Mediation Act, UMA. Malpractice is not protected, and mediation is alive, well and thriving in UMA states! How many of these naysayers have actually mediated or represented clients in mediation in any of the UMA states? What about all the other states that have not signed the UMA, but have their own statutes that do not permit malpractice from being protected by confidentiality?

Once an informed consent case, arising from a mediation, winds its way to the Supreme Court, and the media makes the public aware that California's statutes shield attorney and mediator malpractice, the mediation process will fall out of favor. This will be a stunning blow for court-connected mediation programs, and courts will lose one of their most successful case management processes. Private practice mediators will see a significant decline in cases, and community based programs will suffer as well.

It is stunning that the State Bar has not directly mandated all attorneys make a written disclosure notifying their clients about the malpractice protection. It is interesting that the Judicial Council has not directed courts to educate mediation participants that malpractice is protected, nor have they required mediators handling court-connect cases to make such disclosures.

Informed consent is a critical legal principle, and in some instances constitutionally required. Informed consent must not be discarded, and the present practice of protecting both mediator and attorney malpractice committed during mediation must not continue. I encourage the Commission to send their recommendation to the legislature for immediate enactment.

Sincerely,



Nancy Neal Yeend

EMAIL FROM RICHARD ZITRIN (9/1/17)

Re: CLRC — K402 Study — Support for Tentative Recommendation

Barbara,

Based on my early involvement through articles and letters, I add my strong individual support.

Best,

Richard

RICHARD ZITRIN

Lecturer in Law University of California, Hastings College of the Law c/o 535 Pacific Avenue, Suite 100 SAN FRANCISCO, CA 94133 Direct Phone: 415.354.2701

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